



Royal Commission into Misconduct in the Banking,
Superannuation and Financial Services Industry

Everyday Consumer Credit Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans

Background Paper 4

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The views expressed are the authors' views and are not to be understood as
expressing the views of the Commission.

EVERYDAY CONSUMER CREDIT

AN OVERVIEW OF THE AUSTRALIAN LAW REGULATING CONSUMER HOME LOANS, CREDIT CARDS AND CAR LOANS

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EVERYDAY CONSUMER CREDIT

AN OVERVIEW OF THE AUSTRALIAN LAW REGULATING CONSUMER HOME LOANS, CREDIT CARDS AND CAR LOANS*

1 Introduction

1.1 Credit in history and literature

Historically credit has been viewed with both aspiration and distrust. Credit has considerable enabling force. It allows business to grow and individuals to realise ambitions. Mishandled, credit can be a source of considerable hardship and despair. Credit has a long history of legal, and also religious, bans and restrictions.¹ In the 2008 Canadian Massey Lectures, novelist Margaret Atwood noted that credit and debt have provided the dramatic basis for much great literature through the decades, including in William Shakespeare's *The Merchant of Venice*, Charles Dickens *Little Dorrit*, Gustave Flaubert's *Madame Bovary*, George Eliot's *The Mill on the Floss*, and Arthur Miller's *Death of a Salesman*.² Unsurprisingly, the provision of credit to individuals is subject to a considerable body of law.

1.2 Credit in law

Bank and non-bank lending to consumers, sometimes referred to as consumer credit, is subject to a number of different, commonly overlapping, legal regimes. These regimes include general or 'judge made' law in the areas of contract, tort, property, equity and fiduciary duties that apply to the relationships between consumers and the entities involved in providing credit, including brokers and other intermediaries, and between these entities themselves. Consumer credit is also subject to considerable regulation by statute.³ The primary, credit specific legislation is the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act), incorporating the *National Credit Code* (NCC) and the *National Consumer Credit Protection Regulations 2009* (Cth) (NCR). Consumer credit is also subject to general consumer protection provisions applying to financial products and services under the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). Together these bodies of law constitute the consumer protection regime for consumer credit. The consumer credit protection regime sits alongside the *Australian Consumer Law* (ACL) in sch 2 of the *Competition and Consumer Act 2010* (Cth), which applies to the supply of goods and services to consumers but not to credit,⁴ and the *Corporations Act 2009* (Cth), which applies to financial products other than credit.⁵

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¹ See A Duggan & E Lanyon *Consumer Credit Law* (1999).

² M Atwood *Payback: Debt and the Shadow Side of Wealth* (2008).

³ For a summary of the applicable statutory regimes see Appendix III.

⁴ *Competition and Consumer Act 2010* (Cth) s 131A.

⁵ *Corporations Act* s 765(1)(h)(i) and *Corporations Regulations 2001* reg 7.1.06. There is an exception for margin lending which is regulated under the *Corporations Act* (see s 764A(1)(l)) not the NCCP Act (see NCC s 6(12)).

In this paper, we provide an overview of consumer credit protection law and regulation in Australia and an analysis of the interaction between the regimes. We focus on three types of credit products; home loans, credit cards and car loans and on the credit specific provisions in the NCCP Act and the NCC. We include a discussion of the more general consumer protection provisions applying to financial services and financial products in the ASIC Act. These provisions provide a ‘safety-net’ response to issues not adequately addressed by the credit specific legislation. The statutory regime applying to consumer credit provides the major enforcement tool for the regulator in this context, the Australian Companies and Securities Commission (ASIC).

In this paper, we also discuss what might be termed ‘soft law’ options for regulating consumer credit: industry codes, ASIC guides and external dispute resolution (EDR) schemes. While these regimes do not have the same force as general law and legislation, from the perspective of many consumers they are central to the consumer credit protection regime and to practical redress.

There is relatively little litigation on consumer credit. Disputes between consumers and credit providers (lenders) or credit assistance providers (brokers) are commonly resolved (if at all) internally⁶ or through EDR.⁷ Litigation is often prohibitively expensive for participants, particularly given the amounts of money that are likely to be in dispute may be relatively low compared to legal costs of such action. A low cost, small claims procedure has been established in the Federal Circuit Court for some matters under the NCCP Act,⁸ however, it is not clear how often this procedure is used.⁹ There is increasing interest in Australia in consumer class actions, and these may involve litigation in relation to credit products and services.¹⁰ As yet these are few in number. ASIC runs test cases and enforcement actions in court.¹¹ However these cases necessarily focus on issues of identified

⁶ Holders of an Australian Credit Licence must have an internal dispute resolution procedure: NCCP Act s 47(1)(h).

⁷ Eg through the Financial Ombudsman Service (<https://www.fos.org.au/news/media/fos-supports-ramsay-review-proposals/>): see below 3.4.

⁸ NCCP Act, s 199. The filing fee for the small claims procedure is \$215 (if the claim is less than \$10,000) or \$355 (if the claim is between \$10,000 and \$20,000), see Federal Circuit Court of Australia ‘General Federal Law Fees’ (2017) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/gfl/consumer-matters/fees/>>.

⁹ The Annual Report of the Federal Circuit Court does not provide any reference to the number of matters heard under the small claims procedure, however, in 2015-16, there were only 77 matters in total filed under the FCCA’s Consumer jurisdiction (which includes claims under the Australian Consumer Law, as well as the NCCP Act): Federal Circuit Court of Australia *Annual Report 2015-16*, 59. Further, the discussion in the Annual Report on the small claims list refers only to the small claims jurisdiction under the Fair Work Act (at 77).

¹⁰ See for example, class actions against Cash Converters in Queensland: Maurice Blackburn Lawyers *Cash Converters Class Action in Queensland (2018)* <<https://www.mauriceblackburn.com.au/current-class-actions/cash-converters-class-action-in-queensland/>>.

¹¹ For example, at 1 July 2017, ASIC had 1 criminal matter, 3 civil and 7 administrative matters involving credit before the courts: *ASIC enforcement outcomes: January to June 2017* (Report no 536), 10.

regulatory priority.¹² The overall effect, as we discuss in this paper, is little authoritative interpretation and guidance on many aspects of the legal and regulatory regime for consumer credit protection.

1.3 The scope of this paper

The paper takes the following approach:

- The NCCP Act uses specific terminology to identify the different parties in the credit market and the different obligations that attach to them. We also use the terminology from the NCCP Act. Thus, we refer to:
 - credit providers (which may include banks, non-bank lenders, credit unions, finance companies),
 - credit service providers (such as credit or mortgage brokers and advisers);
 - parties acting as intermediaries (without actually being credit service providers and which may, depending on their business model, include aggregators or mortgage managers); and
 - representatives (parties acting on behalf of a credit licensee, including employees, some linked or point of sale retailers and authorised credit representatives, such as franchisees).
- We focus on the rules relating to home loans, credit cards and car loans. We do not discuss the rules relating to guarantees, mortgages, sale by instalments and consumer leases, to which the NCCP/NCC also apply.
- We provide a necessarily general overview of the relevant regulatory regimes and rules. Some credit providers and credit activities may be subject to regulations in the NCR or specific rules or exemptions provided by ASIC as licensing conditions. We do not comprehensively cover these specific rules and exceptions.
- The *Corporations Act* contains a licensing and conduct regime for financial service providers that is similar to the regime for credit providers in the NCCP. Where relevant, we draw on comparable provisions in the *Corporations Act* to understand better the rules in the NCCP.

1.4 Structure

The paper covers the following topics:

1. introductory matters;
2. the background to consumer protection law generally and consumer credit specifically;
3. an overview of the law applying to consumer credit;
4. the parties typically involved in a credit transaction, their status under the legislation and the relationships between them under general law and statute;
5. the NCCP Act in relation to licensing, disclosure and conduct;
6. responsible lending obligations under the NCCP Act;
7. the NCC;
8. the general consumer protection provisions under the ASIC Act;
9. industry codes.

¹² See eg <http://asic.gov.au/about-asic/what-we-do/our-role/asics-corporate-plan-2017-18-to-2020-21/>.

Appendix I sets out the abbreviations used in this paper.

Appendix II sets out legal terminology used to describe the main parties to credit transactions from the NCCP Act.

Appendix III summarises the different legislation applying to consumer credit.

2 Understanding the objectives of consumer protection and consumer credit law

2.1 Why do we have consumer protection law?

2.1.1 Objectives

Consumer protection law regulates the conduct of providers of goods and services (including credit, financial and investment services) in their dealings with consumers, and in some cases, small business. Consumer law, unlike the private law of contract, is explicitly instrumental. Its purpose is to achieve specific outcomes in order better to protect consumers. These objectives of consumer law are, in general terms, to promote efficient and fair markets. In Australia, and in many other jurisdictions, competition and consumer law are closely linked (e.g. the *Competition and Consumer Act 2010*).¹³ Competition widens choice for consumers and promotes a responsive market attuned to consumer needs. Competition law does not, however, remove the need for consumer protection law. Consumer law may promote competition and therefore market efficiency. Consumer law also advances other social goals, such as the fair and equitable treatment of all consumers in the marketplace.

The Productivity Commission's *Review of Australia's Consumer Policy Framework* (the catalyst for the new legislative regime of consumer law in Australia now found in the ACL and the ASIC Act) recommended that Australian Governments should adopt a common overarching consumer policy objective as:

‘to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and in good faith’.¹⁴

The Productivity Commission also recommended that this overarching objective be supported by six ‘operational objectives’ of consumer policy:

‘The consumer policy framework should efficiently and effectively aim to:

- ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition;
- ensure that goods and services are safe and fit for the purposes for which they were sold;
- prevent practices that are unfair or contrary to good faith;

¹³ See also the Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (Jan 2018).

¹⁴ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) vol 1, 63, Recommendation 3.1.

- meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;
- provide accessible and timely redress where consumer detriment has occurred; and
- promote proportionate, risk-based enforcement.’¹⁵

These objectives were agreed to by the Council of Australian Governments in 2009.¹⁶

2.1.2 Market Failure and Social Norms of Fairness

In the development of consumer protection law in Australia, and in many other countries, a central feature of the regime is a prohibition against conduct that misleads, deceives or coerces consumers to enter into contracts. Decisions are most likely to be welfare enhancing where they are made freely. Conduct that deceives or coerces consumers undermines their capacity for autonomous decision making. Moreover, traders who engage in these types of conduct undermine freedom of contract and may gain an advantage over other traders who are acting consistently with the requirements of a functioning market. In fact, much of the litigation on misleading or deceptive conduct has been instituted by a business against a competitor. It becomes more controversial to decide where the line should be drawn in regulating other types of conduct that affect decision-making of consumers in a less overt manner. Here we inevitably need to invoke values other than mere efficiency.

In thinking about the scope of consumer protection law there are valid competing considerations. On the one hand, we value autonomy and freedom as good in themselves, not merely as means to an end. Thus, not every adverse outcome for consumers warrants a regulatory response. Consumers can and should take responsibility for their own decisions and learn from their mistakes. On the other hand, it is generally agreed that a fair and just society should provide protection for those less able to protect their own interests and should take steps to discourage manipulative and exploitative conduct by businesses in their dealings with consumers. Good regulatory policy will often involve balancing the severity of the harm to consumers, the likelihood of market mechanisms addressing the risk of that harm occurring and the cost of intervention.¹⁷

2.1.3 The role for and the limits of information in consumer protection policy

Another central tenet of consumer protection policy in Australia is ensuring that consumers have access to reliable and accurate information. Competitive markets are premised on consumers purchasing the goods and services that best match their own preferences. To achieve this outcome, consumers need to be informed about the opportunities available to them. In a perfect market this information would be readily available to consumers. In the real world, this does not always happen. Traders may engage in conduct that misleads consumers. Some goods may be difficult for consumers to assess in advance (credence goods) as opposed to through use (experience goods). Consumers may not understand what information they need or the information they need may be prohibitively expensive to

¹⁵ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Inquiry Report No 45 (2008) vol 1, 63, Recommendation 3.1.

¹⁶ Council of Australian Governments *Intergovernmental Agreement for the Australian Consumer Law* (2 July 2009), recitals C and D.

¹⁷ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Inquiry Report No 45 (2008) vol 1, 63.

obtain.¹⁸ Sometimes information can be provided in a form that makes it difficult to compare offerings from different suppliers.¹⁹ These information asymmetries will not necessarily be solved by competition. Traders may have little incentive to provide reliable information about their goods or services because of the likelihood of that information being appropriated for the benefit of their competitors.

Access to good quality information may be important for consumers even after they have entered into a contract, particularly in the event of a dispute between a consumer and the trader. Informed consumers are more likely to be able to assert and enforce their legal rights.

Yet once again information about consumers' rights in the event of a dispute may concern matters that traders have little incentive to disclose.

Accordingly, in some circumstances, there may be a case for regulatory intervention to address the information asymmetry between consumers and traders. Economists typically favour rules about information disclosure over other forms of regulatory intervention addressing consumer protection. Where the market is such that consumers are not getting the information, they need for informed decision-making, and, particularly where the value of that information to consumers is high compared to the cost of that information being provided, then there is a case for mandatory disclosure of that information. There are therefore rules requiring information disclosure in markets for a range of products, including food, credit, medicines, door-to-door sales, second hand motor vehicles, real estate and financial services.

Regulatory reliance on mandatory disclosure has increasingly been challenged.²⁰ For one thing, the required information is often provided too late in the contracting process to be influential. For example, the pre-contractual disclosure information required by the NCC must be provided to the debtor before the contract is entered into or before the debtor makes an offer to enter into the contract.²¹ Providing the information immediately before the contract is entered into will be sufficient to satisfy the disclosure obligation. There is no legislated minimum time between providing the information and entering into the contract. Therefore, it may be that consumers are given little real opportunity to reflect on the information before they are committed.

Moreover, the information provided under mandatory disclosure rules is commonly too complex actually to influence the decision-making of consumers.²² Much of the disquiet with disclosure as a policy strategy stems from the insights from behavioural economics, which identify the limits on the capacity of consumers to act rationally, even when provided with sufficient information. Problems of information overloading, limits on educational outcome and financial competence, along with the pressures of time, limit the use that most

¹⁸ See further Peter Cartwright, *Consumer Protection and the Criminal Law* (2001, Cambridge University Press) Ch 1.

¹⁹ For example, it may be difficult to compare the price of credit if the interest, costs and charges are expressed in different ways by different creditors.

²⁰ Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society* 349.

²¹ NCC s16(2).

²² See also Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (Jan 2018) pp 28-29.

consumers can make of information in choosing between different credit products or services.²³

Reflecting these concerns, the 2014 Financial System Inquiry noted that:

‘The current regulatory framework [for financial services] focuses on disclosure, financial advice and financial literacy, supported by low-cost dispute resolution arrangements. Product disclosure plays an important part in establishing the contract between issuers and consumers. However, in itself, mandated disclosure is not sufficient to allow consumers to make informed financial decisions.’²⁴

2.1.4 Regulating substantive conduct

As regulators have become less confident in the use of information measures to protect consumers, Australia’s consumer protection regime, like that in other jurisdictions such as England and the EU, has moved to include laws that do not merely regulate the process through which contracts are made through, for example, prohibitions on misleading conduct²⁵ and mandatory disclosure.²⁶ Increasingly, consumer protection law has been extended to address matters of what are sometimes termed ‘substantive fairness’. This type of regulation focuses on the substance of consumer transactions by, for example, imposing mandatory, non-excludable, standards of quality on the supply of goods and services²⁷ and prohibitions on unfair contract terms.²⁸ In some cases, substantive regulation extends to price,²⁹ although generally regulators and legislators have considered that price should be left to market mechanisms.³⁰

2.2 Consumer credit regulation

2.2.1 General trends

The trajectory of consumer credit regulation in Australia has followed a similar pattern to that for general goods and services.³¹ Regulation of the supply of credit to consumers has historically involved specific pre-contractual disclosure, or ‘truth in lending’ requirements, now contained in the NCC³² and general protections directed primarily at protecting consumer choice and the decision-making process, such as prohibitions of misleading and unconscionable conduct, now contained in the ASIC Act.³³

²³ See eg Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203; Australian Securities and Investments Commission, *Report 230: Financial literacy and behavioural change* (2011).

²⁴ The Cth Treasury *Financial System Inquiry* (Final Report) (2014) p 193.

²⁵ See further below [6].

²⁶ See below [5.6] and [7.3]

²⁷ See below [8.5]

²⁸ See below [8.6]

²⁹ See below [7.4]

³⁰ *Trade Practices Amendment (Australian Consumer Law) Bill (no 2) 2010: Explanatory Memorandum* [5.64] The upfront price is a matter about which the person has a choice and, in many cases, may negotiate.

³¹ I Ramsay ‘From truth in lending to responsible lending’ in G Howells, A Janssen and R Schulze (eds) *Information Rights and Obligations* (2005) pp 47-65. Also Ronald J Mann, ‘Contracting for Credit’ (2006) 104 *Michigan Law Review* 900.

³² See below Part 7.

³³ See below Part 8.

More recently, as doubt has been cast on the efficacy of truth in lending as a comprehensive consumer protection strategy,³⁴ this regime has been expanded to include more significant regulation, focused on substantive conduct requirements, including through responsible lending obligations in the NCCP Act.³⁵

In addition, modern financial regulation in Australia gives a central role to licensing. Licensing gives regulators a gatekeeping function over who can engage in credit activities and a quality assurance role in monitoring the conduct of those licensees.³⁶

2.2.2 Why is credit regulated under a separate statutory regime?

Specific protections

One of the unique features of consumer credit law is that it has long included a regulatory regime specific to credit. In Australia, consumer credit was originally regulated by the States and Territories, as the Commonwealth government did not have a head of power that allowed it directly to make laws on credit (in contrast to its constitutional powers on banking and insurance).³⁷ In 1996 the States and Territories adopted a largely uniform approach through the Uniform Consumer Credit Code. The prospect of transferring regulation from the States and Territories to the Commonwealth Government was floated in the 1997 Financial System Inquiry, however, the Inquiry took the view that, at that time, the Uniform Consumer Credit Code had not been in operation for enough time to establish whether the criticisms of the Code and its processes for amendment were justified.³⁸

The issue of the appropriate regulatory framework for consumer credit was considered again in the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework, and the Commission considered that 'The case for a national regime [for consumer credit] is compelling.'³⁹ However, the Commission argued that credit should continue to be regulated separately from other financial services as 'credit products are different in character from other financial services, as are the nature and level of the associated risks'.⁴⁰

In 2009, following a referral of powers from the State and Territory Governments, the *National Consumer Credit Protection Act 2009* (NCCP Act) was introduced as Commonwealth legislation. The NCCP Act is now the central consumer protection legislation applying to credit, and it includes the National Credit Code (NCC) in schedule 1 to the NCCP Act. The NCCP Act applies to persons and entities who engage in credit

³⁴ See Commonwealth Treasury *Financial System Inquiry: Final Report* (2014), p 193. Also Paul O'Shea and Dr Carmel Finn, 'Consumer Credit Code Disclosure: Does it Work?' (2005) 16 *Journal of Banking and Finance Law and Practice* 5.

³⁵ See further below Parts 5 and 6.

³⁶ See below [5.3]

³⁷ The Australian Constitution, s51(xii), (xiii).

³⁸ Commonwealth of Australia *Financial System Inquiry, Final Report* (1997), p 257.

³⁹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) vol II p 101.

⁴⁰ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) vol II p 105.

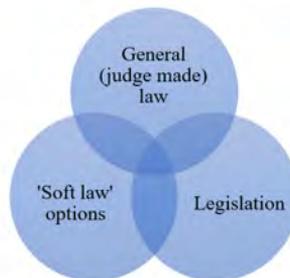
activities. Industry-specific consumer protections for *other* financial products and services (including deposit-taking, insurance and investment) are imposed through the *Corporations Act*.⁴¹

General consumer protection

Before 1998, general consumer protection for consumer of credit (as opposed to the credit specific regulation discussed above) was provided through the economy-wide consumer protection law in the *Trade Practices Act 1974* (Cth). However, in 1998, a separate regime for financial products and services (of which credit is a subset) was introduced. This approach implemented a recommendation of the 1997 Financial System Inquiry. The inquiry took the view that the unique characteristics of the financial system justified specialist regulatory arrangements for consumer protection. It expressed concerns that the coexistence of the consumer protection roles in the ACCC (general consumer protection) and the proposed new financial services consumer protection regulator created the potential for regulatory duplication. It also argued that if the ACCC continued its role as generic consumer protection regulator for financial services, this would detract from the responsibilities of the new financial services regulator.⁴²

This special treatment of financial products and services was retained when the ACL came into effect, replacing the consumer protection provisions in the *Trade Practices Act*. The ACL does not apply to financial products and services.⁴³ However, equivalent provisions, applicable to financial products and services, are implemented through the *ASIC Act*.⁴⁴

3 Overview of the law applying to consumer credit

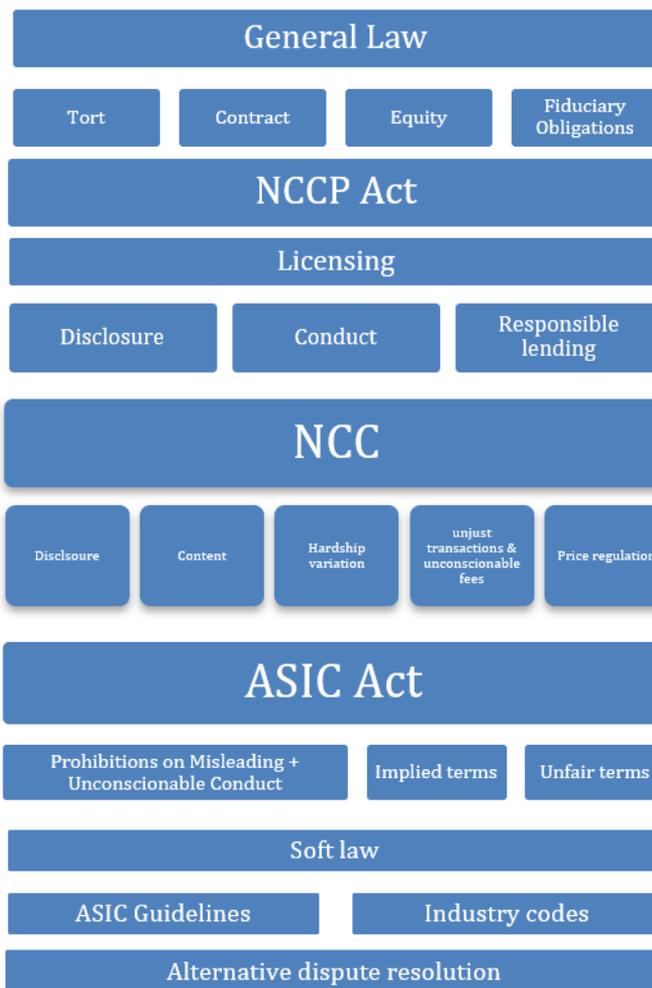


⁴¹ The exception is that margin lending is subject to regulation under the *Corporations Act* and not the *NCCP Act*, despite being a form of credit. See *NCC s 6(12)* – the Code does not apply to the provision of credit by way of a margin loan; and *Corporations Act s 764A* – a margin lending facility is a financial product).

⁴² Commonwealth of Australia *Financial System Inquiry, Final Report* (1997) p 247.

⁴³ *CCA s 131A*. Note that the state and territory legislation implementing the ACL as a law of those jurisdictions does not typically contain this limitation.

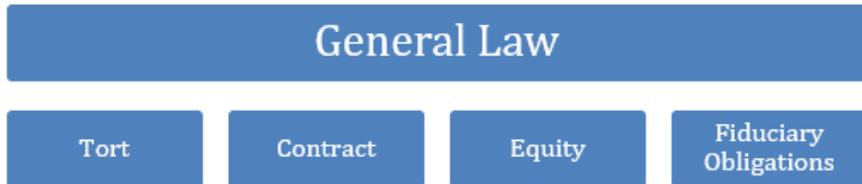
⁴⁴ The definition of 'financial service' in *ASIC Act s12BAB(1)* includes providing financial product advice and dealing in a financial product, and a 'financial product' is defined to include a 'credit facility' (see *s12BAA(7)(k)*). Note that the definition of 'financial product' in the *Corporations Act* (see *ss 763A – 765A*) differs from the definition of financial product in the *ASIC Act* (see *s 12BAA*).



Disputes between consumers and credit providers (eg banks, non-bank lenders, credit unions, finance companies), credit service providers (eg brokers, advisers) and their representatives are commonly resolved by reference to statute law. Statute is also the basis for oversight and enforcement by the regulator. Nonetheless, the role of the general law should not be ignored. General law plays a significant role in in the relationship between consumers and credit licensees in filling the gaps in the scope of the regulatory regime.⁴⁵ The statutory and general law regimes are further complemented by various forms of soft law options that may provide a resolution to the dispute without having the formal force of law. These soft law options include, codes of conduct, ASIC guidelines and external or alternative dispute resolution opportunities, such as through ombudsman services.

⁴⁵ Unlike the *Corporations Act* s 960B, the NCCP Act does not expressly confirm the continued relevance of the general law.

3.1 General law and consumer credit



There are a number of general law doctrines and principles that may apply to govern the relationship between consumers and the entities involved in a credit transaction and also between those entities themselves.⁴⁶

- The relationship between consumers and credit providers (eg banks, credit unions, finance companies) and credit assistance providers (eg brokers) will usually be based on a contract and therefore subject to the law of contract. Equally there will usually be contractual relationships between the different business entities involved in credit transactions, including between credit providers, credit assistance providers, intermediaries, and credit representatives. These relationships may sometimes be difficult to characterise because the business entities involved in a credit transaction may deal in their own right or as an agent or representative of another party.⁴⁷
 - Equitable doctrines operate to supplement the law of contract. In particular, they may provide relief against conduct that has impaired the consent of a consumer or amounts to an abuse of power by a credit provider or credit assistance provider.⁴⁸
 - Tort duties may apply to require credit licensees to perform their services with reasonable care and imposing liability for negligent or fraudulent conduct.⁴⁹
 - Fiduciary duties may apply to credit assistance providers (brokers and advisers), and even credit providers (if they provide advice or assistance) in their dealings with consumers to prohibit the party who is a fiduciary from making an unauthorised profit or acting with a conflict of interests or duties.⁵⁰

⁴⁶ Note however that, unlike the *Corporations Act* s 960B, the NCCP Act does not expressly confirm the continued relevance of the general law.

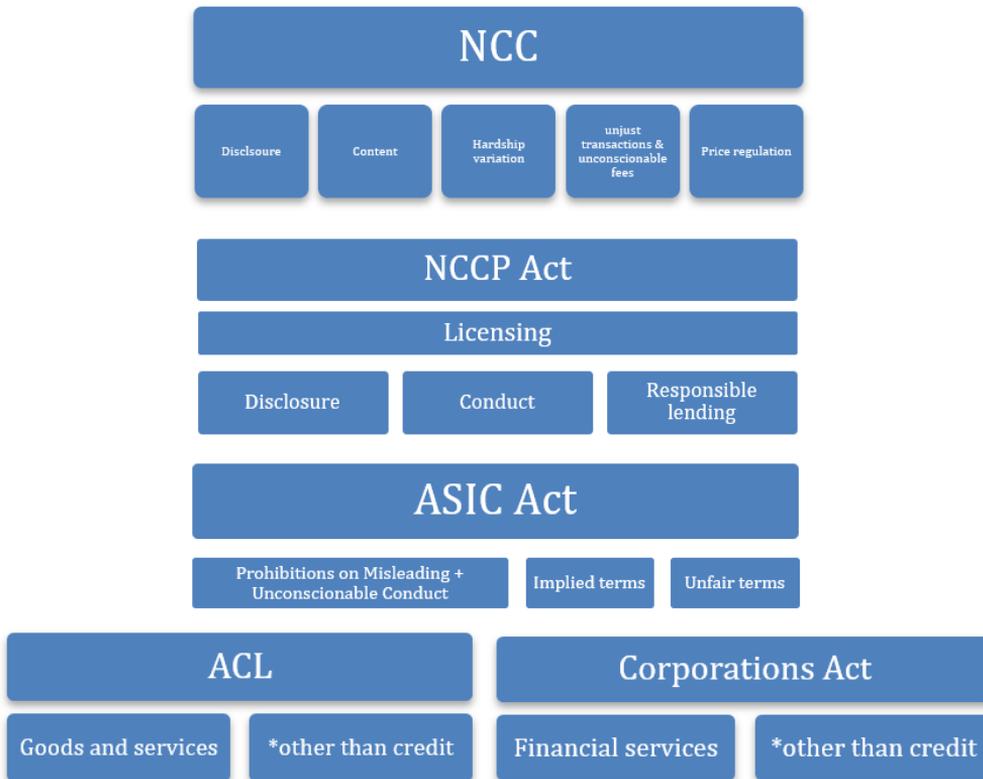
⁴⁷ See further below Part 4.

⁴⁸ Eg *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

⁴⁹ Eg *ABN AMRO Bank v Bathurst Regional Council* [2014] FCAC 65; 224 FCR 1.

⁵⁰ Eg *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351; *McWilliam v Norton Finance (UK) Ltd (in liquidation)* [2015] EWCA Civ 186; [2015] 1 All ER (Comm) 1026. See further below 5.4.3.

3.2 Legislation⁵¹



3.2.1 Industry specific consumer protection legislation - credit

As indicated above, the primary consumer protection legislation for credit is the NCCP Act, which incorporates (in Schedule 1) the NCC. The obligations in the main part of the NCCP Act apply to credit licensees, including both credit providers (eg banks and non-bank lenders) and credit assistance providers (eg brokers and advisers).⁵²

In contrast, the focus of the NCC is on credit providers, rather than those who provide credit assistance, or other services. The key consumer protection obligations in the NCCP Act and NCC cover the following:

- licensing (NCCP Act);⁵³
- mandatory disclosure (NCCP Act and NCC);⁵⁴
- responsible lending (NCCP Act);⁵⁵
- hardship variations (NCC);⁵⁶

⁵¹ See also Appendix III.

⁵² See Part 4 below.

⁵³ NCCP Act, ch 2. See below part 5.3.

⁵⁴ Eg NCCP Act, ch 3 part 3-1, divs 2, 3; part 3-2, div 2; NCC part 2, div 1. See below Parts 5.6 and 7.3.

⁵⁵ NCCP Act, ch 3.

- unjust transactions and unconscionable fees and charges (NCC);⁵⁷
- unfair or dishonest conduct (NCCP Act);⁵⁸ and
- price regulation (NCC).⁵⁹

The NCCP Act and NCC apply only to ‘consumer’ credit – they do not have application to business (including small business)⁶⁰ credit or investment credit (other than credit for residential property investment).⁶¹

3.2.2 General consumer protection legislation - credit

The *ASIC Act* applies to suppliers of credit products and services, including suppliers of business credit and investment credit,⁶² and it imposes (in Part 2, Division 2) largely equivalent provisions to those found in the ACL. These include prohibitions against misleading or deceptive conduct, unconscionable conduct, and unfair contract terms.⁶³

The *Competition and Consumer Act 2010* provides that, with the exception of Pt 5.5 of the ACL (linked credit providers), the ACL enacted as schedule 2 of that Act, does not apply ‘to the supply, or possible supply, of services that are financial services, or of financial products’.⁶⁴ The definition of ‘financial service’ and ‘financial product’ in the *Competition and Consumer Act 2010* adopt the definitions used in the *ASIC Act*, so that there are no gaps in the application of these general consumer protection provisions.⁶⁵ In other words, if a product falls within the ASIC Act definition of financial product it will be subject to the general consumer protection provisions in the ASIC Act. If it does not, it will be subject to the general consumer protections in the ACL.

3.2.3 Consumer protection – other financial products and services (non-credit)

In the case of financial products and services other than credit⁶⁶ (for example, banking, insurance and investment), a detailed, specific consumer protection regime is found in Chapter 7 of the *Corporations Act*. The consumer protections in the *ASIC Act* also apply to

⁵⁶ NCC part 4, div 3.

⁵⁷ NCC part 4, div 3.

⁵⁸ NCCP Act s180A.

⁵⁹ NCC part 2, div 4, 4A. See further on these obligations in 7.4 below.

⁶⁰ NCC s 5(1).

⁶¹ NCC ss 5(1), (3).

⁶² The ASIC Act provisions apply to financial services (eg, ASIC Act s12DA). The definition of ‘financial service’ in s12BAB(1) includes providing financial product advice and dealing in a financial product, and a ‘financial product’ is defined to include a ‘credit facility’ (see s12BAA(7)(k)).

⁶³ See Part 7 below.

⁶⁴ CCA s131A. Interestingly, State and Territory laws applying the ACL do not contain a provision equivalent to s 131A of the CCA.

⁶⁵ See ACL s2(1) (definitions of ‘financial product’ and ‘financial service’).

⁶⁶ *Corporations Act* s 765(1)(h)(i) and *Corporations Regulations 2001* reg 7.1.06 (for the purposes of the Act financial product does not include credit). The exception is that margin lending is subject to regulation under the *Corporations Act* and not the NCCP Act, despite being a form of credit. See NCC s 6(12) – the Code does not apply to the provision of credit by way of a margin loan; and s *Corporations Act* s 764A(1)(l) – a margin lending facility is a financial product.

other financial products and services, including banking, superannuation, insurance and investment.⁶⁷

3.2.4 Consumer protection legislation – goods and services (other than financial products and services)

In the case of goods and services *other than* financial products and services, the general consumer protections in the ACL will apply. Industry specific consumer legislation or other regulation may also apply for some products and services.⁶⁸

3.3 ‘Soft law’



3.3.1 Industry codes

The banking and finance industry has adopted a number of voluntary industry codes which apply to the relationship with relevant consumer customers. These include the Code of Banking Practice (COBP), the Customer-Owned Banking Code of Practice and the Mortgage and Finance Industry Association Code of Practice. We focus on the COBP.

The COBP is published by the Australian Bankers’ Association and the most recent version (2013) has been adopted by most banks offering retail products in Australia,⁶⁹ although there is no industry or legislative requirement that they do so.⁷⁰ For subscribing banks, the provisions of the Code apply to their ‘banking services’, defined as ‘any financial service provided in Australia’ to the bank’s individual and small business customers.⁷¹ The COBP also applies to products or services provided by a subscribing bank through an intermediary.⁷² The COBP will therefore apply to subscribing banks when they provide home loans, car loans and credit cards, as well as other credit products.

Some of the obligations in the COBP overlap the policy ground covered by the NCCP Act and NCC.⁷³ The COBP applies to both individual and small business customers, in contrast to the NCCP Act and NCC, which apply only to natural persons and strata corporations.⁷⁴

⁶⁷ See the definitions of ‘financial product’ and ‘financial service’ in *ASIC Act* ss 12BAA and 12BAB. Note that the definition of ‘financial product’ in the *Corporations Act* (see ss 763A – 765A) differs from the definition of financial product in the *ASIC Act* (see s 12BAA). Most relevantly, a ‘credit facility’ is specifically excluded from the definition of ‘financial product’ in the *Corporations Act*, see s765(1)(h).

⁶⁸ See eg *Telecommunications Act 1997* (Cth), part 6 (Industry Codes and Industry Standards).

⁶⁹ In information provided to the most recent review of the Code of Banking Practice, the Australian Bankers’ Association advised that over 95% of banking services in Australia are provided by banks that subscribe to the Code of Banking Practice: Phil Khoury *Independent Review of the Code of Banking Practice* (2017), p 10.

⁷⁰ This contrasts with the legislative obligation imposed on credit businesses to belong to an external dispute resolution scheme: *NCCP Act* s 47.

⁷¹ COBP cl 42 (definitions of ‘banking service’, ‘you’ and ‘small business’).

⁷² COBP cl 42 (definition of ‘banking service’).

⁷³ See further part 9 below.

⁷⁴ See further part 7.

Non-compliance with the COBP

The COBP applies as a matter of contract between a subscribing bank and its individual and small business customers.⁷⁵ If a subscribing bank does not comply with the COBP, an affected customer could institute legal proceedings for breach of contract.⁷⁶

Non-compliance with the COBP can also be investigated by the independent Code Compliance Monitoring Committee,⁷⁷ however, Committee has no powers to award compensation.⁷⁸

The most likely avenue for redress for a subscribing bank's failure to comply with a provision of the COBP is through the Financial Ombudsman Service ('FOS' - the relevant External Dispute Resolution (EDR) Scheme for most banks).⁷⁹ In deciding how a dispute against a subscribing bank should be resolved, FOS can take the provisions of the COBP into account.⁸⁰

The COBP can also be relevant for disputes against institutions that do not subscribe to the COBP, as FOS also take into account the COBP in determining a dispute against a non-subscriber, if it takes the view that provisions in the COBP represent 'good industry practice'.⁸¹ For example, in the context of responsible lending, FOS notes:

'... we consider that industry codes reflect good industry practice, so we expect all FSPs – even if they have not subscribed to the codes – to make sure their lending guidelines are in line with the codes' required standards.'⁸²

FOS has also confirmed its view that, where a bank or other financial services provider has subscribed to an industry code, non-compliance with that code is a breach of the contract with the customer, and the customer may be entitled to compensation for any loss suffered.⁸³

ASIC does not have any powers to take enforcement action in relation to conduct that breaches the COBP or another industry code, unless that conduct also breaches a provision of the legislation that ASIC administers. However, reference to the requirements of an industry code is one of the factors that a court may have regard to in assessing whether there is unconscionable conduct under the ASIC Act.⁸⁴

⁷⁵ See COBP cl 12.3.

⁷⁶ See, for example, *National Australia Bank Ltd v Rose* [2016] VSCA 169.

⁷⁷ COBP cl 36(b).

⁷⁸ See Code Compliance Monitoring Committee *Our investigations* (2018) <<http://www.ccmc.org.au/about-us/what-we-do-2/our-investigations/>>.

⁷⁹ There is a second ASIC-approved external dispute resolution scheme – the Credit and Investments Ombudsman. It takes a similar approach to industry codes in dispute resolution: see CIO Rules (10th edition, in force from 15 August 2016), cl 12.

⁸⁰ Eg FOS Terms of Reference (as amended 1 January 2018), cl 8.2(b).

⁸¹ Eg FOS Terms of Reference (as amended 1 January 2018), cl 8.2(c).

⁸² FOS Approach, Responsible Lending, 5. A similar comment is made in relation to the financial difficulty obligations: FOS Approach to Financial difficulty series: Legal principles, industry codes and good practice, 5.

⁸³ FOS Approach, The Code of Banking Practice, 3.

⁸⁴ ASIC Act ss 12CC(1)(h), (2)(h), (3).

3.3.2 ASIC Guidelines

The limited amount of litigation on consumer credit means there may be little judicial interpretation of the relevant legislative provisions. Many of these provisions are drafted in a principle based or open textured style relying on broad standards rather than prescriptive rules (eg unconscionable conduct, unjust contracts, not unsuitable credit). Market participants may then feel they are hampered by a lack of certainty as to the scope of their obligations.

In some contexts, ASIC has sought to fill this interpretative gap by providing guidance on its view of the law. For example, ASIC has produced extensive guidance on the responsible lending⁸⁵ and the conduct⁸⁶ obligations of credit licensees. These guidelines might be described as ‘soft law’.⁸⁷ They do not have formal legal status but nonetheless influence the conduct of those regulated by the relevant law. In addition, the Administrative Appeals Tribunal has given some weight to ASIC Regulatory Guides in reviewing ASIC decisions.⁸⁸

In most cases, ASIC Regulatory Guides are developed following a consultative process. However, unlike case law, the ASIC Guidelines are not subject to the adversarial debate and scrutiny that surrounds judicial decision-making. The guidance statements may therefore risk taking on an authoritative status that is unwarranted due to the hesitance of entities requiring a credit licence to challenge the view of the licence granting body.

3.4 External dispute resolution schemes



As already noted, most disputes between consumers and credit providers/credit assistance providers are not heard in court. Another option for consumers is alternative dispute resolution, such as offered by the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO).⁸⁹ (Remembering that a condition of an Australian Credit Licence is that the licensee be a member of an external dispute resolution service.⁹⁰)

⁸⁵ ASIC Regulatory Guide 209 *Credit licensing: Responsible lending conduct* (2014).

⁸⁶ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (2010).

⁸⁷ See E Bant and J Paterson, ‘Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia’ in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU E Press 2017).

⁸⁸ See eg *Vissenjoux v ASIC* [2015] AATA 98 [13]-[14]; *Coshett v ASIC* [2014] AATA 677 [16].

⁸⁹ See generally the discussion of dispute resolution and the different schemes in the financial services sector in Cth Treasury *Review of the financial system external dispute resolution and complaints framework* (Final Report) (2017).

⁹⁰ NCCP Act s 47.

In 2018, FOS and CIO will have their functions taken over by the new Australian Financial Complaints Authority, designed to be a one-stop shop for financial services disputes.⁹¹

3.4.1 Dispute resolution at FOS

FOS can accept disputes about credit services up to an amount of \$500,000. The monetary limit on awards is \$323,500 for most disputes.⁹² EDR schemes receive large numbers of disputes each year from consumer customers. For example, in 2016-17, FOS (the larger scheme⁹³) accepted almost 10,000 disputes about consumer credit.⁹⁴ This contrasts with a total of 119 consumer matters filed in the Federal Circuit Court of Australia in 2016-17, many of which may have involved goods or services other than consumer credit.⁹⁵ In practice, the EDR schemes are the first port of call (external to the credit provider) for most consumers wanting to pursue a dispute about a consumer credit product or service.

3.4.2 Process of dispute resolution

EDR schemes aim to resolve disputes informally and efficiently, with a focus on negotiation. For example, FOS explains that it aims to resolve disputes in a timely manner with ‘minimum formality and technicality’ and ‘as transparently as possible, taking into account our obligations for confidentiality and privacy.’⁹⁶

Disputes in the EDR schemes are usually resolved through negotiation and conciliation,⁹⁷ and in these cases, there is no written assessment by the EDR scheme of the merits of the dispute, and/or the extent to which common law, statutory, and/or industry code obligations are applicable and/or have been complied with by the financial services provider.

If a dispute is unable to be resolved through negotiation or conciliation, a written decision may be provided by the relevant scheme. The decision-making criteria includes legal principles, but other criteria are also relevant, including what is fair in all the circumstances, applicable industry codes, good industry practice, and previous relevant decision of FOS (or a predecessor scheme).⁹⁸ The fact that the legal principles are not the sole decision-making criteria means that a dispute can be resolved in a manner that is different to how it would be resolved if the matter was litigated. FOS explains that it:

⁹¹ See *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018*. The new organisation will also encompass the functions currently being carried out by the Superannuation Complaints Tribunal.

⁹² Financial Ombudsman Service *What we do* (2018) <<https://www.fos.org.au/about-us/what-we-do/>>.

⁹³ In 2015-16, FOS received almost 88% of the disputes lodged at the two ASIC-approved EDR schemes: Cth *Treasury Review of the financial system external dispute resolution and complaints framework* (Final Report) (2017), p 48.

⁹⁴ FOS *Annual Review 2016-17* (2017) p 69.

⁹⁵ Federal Circuit Court of Australia *Annual Report 2016-17* (2017) p 56. Consumer matters includes matters under the ACL and Part XI of the Competition and Consumer Act as well as claims under the NCCP Act (p 26).

⁹⁶ Financial Ombudsman Service *What we do* (2018) <<https://www.fos.org.au/about-us/what-we-do/>>.

⁹⁷ Eg, in 2016-17, of the 39,481 disputes received by FOS, 60% were resolved by agreement between the parties; 25% were discontinued or outside the terms of reference; and 15% were resolved by FOS decision or assessment: Financial Ombudsman Service *Annual Review 2016-17* (2017) p 65.

⁹⁸ FOS *Terms of Reference* (amended 1 January 2015), cl 8.2

‘takes the approach that it should identify relevant legal principles and take these into account in its consideration of a Dispute.... This does not mean FOS must strictly apply the legal principles. However, FOS will consider these when handling a Dispute and if it is necessary to deviate from those principles to achieve fairness in the circumstances, it will identify its reasons for doing so.’⁹⁹

Written decisions from FOS take the form of Recommendations (which are only binding if accepted by both parties) and Determinations. If the consumer accepts a Determination, it will be binding on the financial service provider. If the consumer does not accept the decision, the decision does not bind either party, and the consumer is free to pursue other avenues for resolving the dispute.¹⁰⁰ CIO has a similar process.¹⁰¹ There is generally no appeal to the courts on the merits of a decision of FOS or CIO;¹⁰² nor is judicial review generally available.¹⁰³

The decisions of the EDR schemes are not binding on courts and have no status as precedent in the judicial system. The schemes both publish their written decisions (in an anonymised form), as well as detailed statistics, guidelines and case studies which illustrate the schemes’ approaches to particular types of disputes.¹⁰⁴

⁹⁹ FOS *Operational Guidelines to the Terms of Reference* (1 January 2018), 76-77.

¹⁰⁰ Financial Ombudsman Service *Dispute resolution process in detail* (2018) <<https://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/>>.

¹⁰¹ See Credit and Investments Ombudsman *Complaint handling process* (2017) <<https://www.cio.org.au/complaint-resolution/complaint-process.html>>.

¹⁰² As the schemes are contractually based, a member could institute proceedings against a scheme that breached the contract with the member, for example, by not acting consistently with the scheme’s Terms of Reference. This might involve an appeal of a determination, but to date, no court has overturned a FOS decision: see Cth Treasury *Review of the financial system external dispute resolution and complaints framework* (Final Report) (2017), p 54.

¹⁰³ See, for example, *Mickovski v FOS and Metlife* [2011] VSC 257; [2012] VSCA 185 and other cases summarised by FOS at <http://fos.org.au/resolving-disputes/legal-cases/#id=undefined>.

¹⁰⁴ See for example, FOS *Annual Review 2016-17* (2017)

4 The parties involved in a credit transaction

Carla decides to take out a loan. She approaches a credit *broker* with a prominent brand name for advice. The credit broker states that it operates as *credit assistance provider* to find the best loan for Carla's circumstances, negotiate the interest rate and fees and manage the paperwork associated with the loan. The loan is provided by a bank as *credit provider*, for whom the brokering firm is a *credit representative*.

The legal rights and obligations of consumers in dealing with the various entities involved in a credit transaction will depend on the contractual and statutory status of those entities not on the terminology they use to describe themselves. This means that the legal status of the entities may not be entirely clear at the outset to consumers, although as we shall see disclosure obligations go some (although not all) the way to clarifying these issues.¹⁰⁵

4.1 Contractual relationships

A credit transaction will be structured by a series of contractual relationships between the consumer and the different credit entities and between those entities. These may include contracts between:

- consumers and credit assistance providers, such as brokers, for the credit assistance service;
- consumers and the credit provider, such as a bank or non-bank lender, for the provision of the credit;
- credit representatives and the credit licensee on whose behalf the representative acts, authorising the scope of the representation and providing for supervision of the activities of the representative by the licensee;
- credit franchisees and franchisor, governing the operation of the franchisee;
- credit assistance providers and credit providers in the form of arrangements for payment of commissions and fees;
- credit managers and product designers with the credit provider, for the provisions of these services;
- special purpose funding entities and the licensee that performs the obligations of a credit provider under a service agreement.¹⁰⁶

These contractual relationships go some way to determining the licensing and disclosure obligations of the various entities in a credit transaction under the NCCP Act.

¹⁰⁵ See also Appendix II.

¹⁰⁶ NCR reg 23B, Schedule 3.

4.2 Categories of obligation under the NCCP

The licensing regime in the NCCP Act was introduced at least partly in response to concerns that credit regulation in Australia had not kept pace with the proliferation of credit products and services.¹⁰⁷ The Productivity Commission recommended a national licensing scheme for both credit providers and ‘finance brokers’.¹⁰⁸ However, as noted in the Explanatory Memorandum to the NCCP Act, the increasing complexity of the credit market means that the distinctions between credit providers and other parties who provide credit services are not straightforward.¹⁰⁹

Under the NCCP whether an entity with some involvement in a credit transaction has to be licensed and the nature of the obligations attached to that licence are determined by the credit activities that the entity is engaged in and their relationship with other credit licensees. These defining activities and relationships are discussed below.¹¹⁰

4.2.1 Key categories of credit activity

The NCCP identifies four key categories of credit activity that will bring a person within the scope of the licensing requirements under the NCCP, and through this the disclosure, conduct and responsible lending obligations.¹¹¹

See also Appendix II

‘Credit provider’

A ‘credit provider’ for the purposes of the NCCP Act is an entity that provides credit.¹¹² Credit providers may be banks, non-bank lenders or finance companies.

‘Credit service’ provider

Persons are required to hold a credit license where they provide a ‘credit service’. A person provides a ‘credit service’ if they:

- provide credit assistance to a consumer; or
- act as an intermediary.¹¹³

These two categories overlap; a person who provides credit assistance will also be an intermediary. However, as we will see below, the reverse is not the case.

¹⁰⁷ This is noted by the Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Inquiry Report No 45 (2008) vol II p 448 and the *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [2.6].

¹⁰⁸ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Inquiry Report No 45 (2008) vol II pp 451-4.

¹⁰⁹ *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [2.12]

¹¹⁰ It is important to remember that whether a person engages in a relevant ‘credit activity’ for licensing purposes is also dependent on the definition of ‘credit’ under the NCC.¹¹⁰ Thus, for example, a person will not engage in a ‘credit activity’ for the purposes of the NCCP Act where they engage in credit activities with respect to business purposes, because credit for business is not covered by the NCC. This example is provided by the *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [1.14].

¹¹¹ See also Appendix II.

¹¹² NCC s 204. Also assignees of credit providers under NCCP Act s 10.

¹¹³ NCCP Act s 7. A party may act as both a credit intermediary and a credit assistance provider: ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) [57].

'Credit assistance' provider

A person will provide 'credit assistance' for licensing purposes if they:

- Suggest that the consumer:
 - Apply for a provision of credit (in respect of either a particular credit contract with a particular credit provider or a particular lease with a particular lessor);
 - Apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- Assist the consumer to
 - Apply for a provision of credit (in respect of either a particular credit contract with a particular credit provider or a particular lease with a particular lessor); or
 - Apply for an increase to the credit limit of a particular credit contract.¹¹⁴

Common examples of credit assistance providers are credit or mortgage brokers and credit or mortgage advisers.¹¹⁵

'Acting as an intermediary'

A person is 'acting as an intermediary' under the NCCP Act if they:

act as an intermediary (whether directly or indirectly) between a credit provider and a consumer wholly or partly for the purposes of securing a provision of credit for the consumer under a credit contract for the consumer with the credit provider.¹¹⁶

The category of intermediary appears to be a catch all category,¹¹⁷ covering those entities involved in a credit transaction as a conduit between consumer and credit provider but without actually advising, suggesting or assisting consumers in the provision of credit so as to be credit assistance providers.

Some of the parties who might otherwise be in this category are subject to exemptions, such as clerks and cashiers.¹¹⁸ ASIC suggest that, depending on their business model, the category might include mortgage aggregators (not defined in the NCCP/NCP),¹¹⁹ 'mortgage managers'¹²⁰ and 'product designers'.¹²¹

¹¹⁴ NCCP Act s 8, summarized by the *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [1.23]. Similar definitions apply to assistance in relation to a credit lease.

¹¹⁵ ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75].

¹¹⁶ NCCP Act s 9.

¹¹⁷ *Revised Explanatory Memorandum National Consumer Credit Protection Bill 2009* (Cth) [1.28].

¹¹⁸ NCR reg 24(10).

¹¹⁹ '[W]here they act as a conduit between a broker and a credit provider in arranging the credit': ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75]; *Revised Explanatory Memorandum National Consumer Credit Protection Bill 2009* (Cth) [1.31].

¹²⁰ '[If] they are involved in arranging the credit': ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75]. See definition in NCR reg 26; *Revised Explanatory Memorandum National Consumer Credit Protection Bill 2009* (Cth) [1.31].

¹²¹ '[If] they are involved in arranging the credit': ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75]. See definition in NCR reg 26.

4.2.2 Exempt persons and credit activities.

Some persons engaging in what would otherwise be relevant credit activities are exempt from the licensing requirements under the NCCP Act.¹²² Relevantly these include:

- a person who [only] passes on information about a credit licensee to consumers;
- a person providing a [mere] referral;
- suppliers of goods or services operating with a linked credit provider or an issuer of a co-branded credit card;
- an (authorised) credit representative;
- a representative of a credit licensee;
- a special purpose funding entity.

Passing on information

A person who merely passes on information to consumers that has been provided by or is about a credit licensee, accompanied by advice about the licensee, will not be engaging in a credit activity that requires a credit licence under the NCCP Act.¹²³

An example of this category will be (some) comparison websites.¹²⁴

Referrals

The NCR allow various types of referrals to be made without the referrer holding a credit licence. The exemption covers two situations, sometimes referred to as ‘downstream’ and ‘upstream’ referrals. These cover, respectively:

- a person who refers consumers to a credit licensee; and¹²⁵
- a person who, with the permission of a consumer passes the consumer’s contact details and information about the consumer’s requirements onto a credit licensee so that the licensee may contact them.¹²⁶

There are several conditions that attach to these categories of licensing exemptions. Importantly, the referrer must disclose to consumers any commission or benefits it receives for the referral.¹²⁷

An example of this activity will be conduct by a retailer or real estate agent in directing a consumer to a potential credit provider or credit assistance provider.¹²⁸

¹²² NCR Pt 2.4.

¹²³ NCR reg 24(6), (7) and (8).

¹²⁴ ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [77].

¹²⁵ NCR regs 25(2) also 25(2A).

¹²⁶ NCR regs 25(5).

¹²⁷ See NCR regs 25(2), 25(2A), 25(5). See also *Explanatory Statement Select Legislative Instrument 2010* p 21.

¹²⁸ ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [77]. See also exemptions for referrals in the NCR regs 25(2), 25(2A) and 25(5).

Suppliers of goods or services acting under the ‘point of sale’ exemption with a ‘linked credit provider’

Suppliers of goods or services may want to arrange credit for their customers at their own premises in order to assist those customers in buying the suppliers’ products. The NCR provide an exemption from the requirement to hold a credit license for suppliers in this situation allowing them to provide application forms and process applications for credit in store for an external credit provider. Suppliers will be exempt from the credit licensing requirements in the NCCP Act where they act on behalf of a ‘linked credit provider’¹²⁹ in assisting consumer to obtain credit and the credit initially provided is to be used ‘predominantly’ to pay for goods or services provided by the supplier.¹³⁰

This arrangement is sometimes referred to as the ‘point of sale’ exemption, because the supplier operating at the point of sale is exempted from being licensed.¹³¹

There are strict conditions that must be satisfied for the exemption to apply set out in the NCR.¹³²

Suppliers of goods and services and their linked credit providers share liability (subject to certain defences) for misrepresentation, breaches of contract and contraventions of the ACL under the NCCP¹³³ and the ACL.¹³⁴

The point of sale exemption is commonly used in stores selling white goods and electrical items to allow an application for credit for the purchase of those goods to be processed ‘in-store’. The point of sale exemption is similarly used in car finance.¹³⁵

Some regulatory concerns have been expressed about the point of sale exemption and whether it is compatible with the philosophy of the NCCP Act licensing conduct and responsible lending regime.¹³⁶ As yet there have been no legislative proposals to remove the exemption.

¹²⁹ NCC s 127; NCR Reg 25B.

¹³⁰ NCR reg 23.

¹³¹ See eg ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) p 50; Cth Treasury *The exemption of retailers from the National Consumer Credit Protection Act 2009: Discussion Paper* (2013).

¹³² NCR reg 23. In particular, the exemption does not apply where the sale was unsolicited: reg 23(4).

¹³³ NCCP Act Part 7.

¹³⁴ ACL part 5-5.

¹³⁵ Treasury has estimated that point of sale activities are carried out by around 12,000 retailers and 630 car dealerships: Cth Treasury *The exemption of retailers from the National Consumer Credit Protection Act 2009: Discussion Paper* (2013) [12].

¹³⁶ See Cth Treasury *The exemption of retailers from the National Consumer Credit Protection Act 2009: Discussion Paper* (2013).

Suppliers of goods with branded or co-branded credit cards

Credit cards are sometimes co-branded with the names of a credit provider and a supplier of goods or services, such as a department, electrical or white goods store. A supplier of goods or services will be exempt from the credit licensing requirements in the NCCP Act where the supplier is performing credit activities on behalf of a linked credit provider¹³⁷ in respect of a credit card that is branded or co-branded in the name of the supplier or a related body corporate.¹³⁸ This arrangement is also part of what is sometimes referred to as the ‘point of sale’ exemption.¹³⁹

‘Credit (authorised) representatives’

‘Credit representatives’ are persons authorised by a credit licensee to engage in specified credit activities on behalf of the licensee.¹⁴⁰ For this reason credit representatives are sometimes referred to as ‘authorised’ representatives. A credit representative may provide a credit service without holding their own licence in relation to those services. Instead they act on the authority of the credit licensee.

Examples of credit representatives include brokers operating as the franchisees of a credit franchisor¹⁴¹ and brokers acting as the credit representatives of a mortgage aggregator or manager.

‘Representatives’ [of a credit licensee]

The NCCP recognises that a credit licensee may act through various representatives for whom it is responsible. These include:

- employees and directors of the licensee or a related body corporate;
- a credit representative;
- any other person acting on behalf of the licensee¹⁴² (which will often include suppliers with whom the licensee is a linked credit provider or co-brands a credit card as discussed above).

¹³⁷ NCR reg 25C.

¹³⁸ NCR reg 23A.

¹³⁹ *Explanatory Statement Select Legislative Instrument 2010 no 105.*

¹⁴⁰ NCC Act s 64 and also s 65. See also NCC Act s 67 – a person cannot be a credit representative in relation to activities authorised by their own credit licence.

¹⁴¹ ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) p 43.

¹⁴² NCCP Act s 4.

Representatives are not subject to the obligations applying to a licence holder under the NCCP Act. They must be supervised by the licence holder.¹⁴³ A credit licence carries general conduct obligations to:

- ‘take reasonable steps to ensure that its representatives comply with the credit legislation; and ...
- ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence’.¹⁴⁴

The licensee will be itself responsible for satisfying the disclosure and responsible lending obligations under the NCCP Act relating to its licence.

The regulatory sandbox

ASIC has established a licensing exemption for people to test new businesses in the consumer credit market.¹⁴⁵ The exemption is limited and subject to strict disclosure requirements.¹⁴⁶

4.3 Specific transactions

4.3.1 Home loans



Claude is seeking to buy his first home. After Claude identifies the house he would like to buy, the *real estate agent* gives him the name of a *mortgage broker* who may be able to assist with finance. The mortgage broker recommends a loan through a bank. The loan funds are provided through a *special purpose funding entity* with whom the lender has a *servicing agreement*.

Home lending may be one of the most complex multi-party credit transactions.¹⁴⁷ The Productivity Commission reports that ‘just over 50% of all new home loans now originate through a broker’.¹⁴⁸ ASIC has noted high levels of vertical integration, particularly between mortgage aggregators and lenders, and a significant lack of transparency in the ownership and funding arrangements in the home lending market.¹⁴⁹

¹⁴³ See NCCP Act pt 2-3. See also ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010): In respect of those providing third party home loan credit assistance, ASIC considers that representatives need to have at least a Cert IV in Finance and Mortgage Broking.

¹⁴⁴ NCCP Act s 47(1).

¹⁴⁵ ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016.

¹⁴⁶ Ibid.

¹⁴⁷ See also Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (2018) p 30.

¹⁴⁸ Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (2018) p 7.

¹⁴⁹ ASIC Report 516: *Review of mortgage broker remuneration* (2017).

For example:

- Mortgage brokers may work independently or with a mortgage aggregator.
- Loan funds negotiated by an aggregator may be provided through a bank or through an aggregator as a ‘white label arrangement’ in the name of the aggregator.
- The funding bank may hold a considerable ownership stake in a mortgage aggregator.
- Non-bank lenders may source loan funds through a bank, or through wholesale market arrangements.

The legal status of the entities involved in a home loan, and thus their legal obligations, will vary according to their precise activities and arrangements. Primary responsibility under NCCP Act will be held by the parties who perform the functions of credit assistance provider¹⁵⁰ (usually a broker) and credit provider (usually a lender/financier).¹⁵¹

Referral by a real estate agent – a real estate agent who merely refers a consumer to a credit provider or credit assistance provider to obtain assistance for a loan will usually not involve acting as a credit service provider under the NCCP and so will not require a licence.¹⁵²

Suggestion or assistance by a mortgage broker - a mortgage broker who suggests a particular home loan or assists the consumer in obtaining a home loan will be a credit assistance provider,¹⁵³ a credit representative¹⁵⁴ or a (mere) representative of a credit licensee (who has a licence authorising credit assistance) and supervised by that licensee.¹⁵⁵ Some mortgage brokers who are credit representatives are franchisees of a credit licensee and subject to a franchise agreement that requires them to comply with the policies of the franchisor.¹⁵⁶

Participation of a mortgage aggregator - like broker, the term ‘aggregator’ is not used in the NCCP Act or NCR. Aggregators act as conduits between brokers and credit providers.¹⁵⁷ They bundle loans to present for funding to a credit provider and offer access to lenders and various support services to brokers.¹⁵⁸ In this context, aggregators will be acting as credit

¹⁵⁰ NCCP Act s 8.

¹⁵¹ NCC s 204. Also assignees of credit providers under NCCP Act s 10.

¹⁵² ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) [119].

¹⁵³ NCCP Act s 8.

¹⁵⁴ NCC Act s 64 and also s 65. See also NCC Act s 67 – a person cannot be a credit representative in relation to activities authorised by their own credit licence.

¹⁵⁵ See NCCP Act pt 2-3.

¹⁵⁶ ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) p 43.

¹⁵⁷ Some aggregators provide ‘white label’ loans in their own name but funded by a credit provider: Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (Jan 2018) p 214.

¹⁵⁸ Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (Jan 2018) p 214; On concerns about the remuneration of brokers and the impact of these structures on good consumer outcomes see also *ASIC Report 516: Review of mortgage broker remuneration* (2017) p 7.

intermediaries for licensing purposes.¹⁵⁹ An aggregator may also act as a credit assistance provider either directly or through the services of a credit representative.¹⁶⁰

Ongoing coordination by a mortgage manager – the ongoing obligations under the home loan may be managed for a lender by a mortgage manager.¹⁶¹ For licensing purposes mortgage managers may act as credit intermediaries (if they have some involvement in arranging the credit).¹⁶²

Funds through a special purpose funding entity – the funds for a home loan may be provided through a ‘special purpose funding entity’,¹⁶³ which includes either a ‘fund raising special purpose entity’¹⁶⁴ or a ‘securitisation entity’,¹⁶⁵ and which exists for limited purposes related to fundraising and securitisation respectively. A special purpose funding entity will be exempt from licensing where it is a member of an external dispute resolution scheme and is a party to a ‘servicing agreement’¹⁶⁶ with a party that holds a credit licence and performs the obligations of a credit provider under the NCCP Act and NCC.¹⁶⁷

4.3.2 Credit cards



Charvi wants to rationalise her credit card debt. She consults a *website* for assistance in identifying suitable cards. This research suggests that her best option would be a card *co-branded* between a bank and a well-known department store. Charvi goes to the department store and the store sales assistant provides her with the documents needed to apply for the credit card. The store relies on the *point of sale exemption* from holding a credit licence.

The primary player in a credit card transaction will be the credit provider (card issuer).¹⁶⁸ Other common participants may be exempt from licensing requirements under the NCCP Act.

¹⁵⁹ ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) [75].

¹⁶⁰ See also Productivity Commission Draft Report *Competition in the Australian Financial System* (Jan 2018).

¹⁶¹ See NCR reg 26.

¹⁶² ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) [75].

¹⁶³ NCR reg 3.

¹⁶⁴ NCR Schedule 3.

¹⁶⁵ NCR Schedule 3.

¹⁶⁶ NCR regs 23B and 23C.

¹⁶⁷ NCR regs 23B and 23C, Schedule 3.

¹⁶⁸ NCC s 204. Also assignees of credit providers under NCCP Act s 10.

Comparison websites – web-sites that provide comparative information about different credit cards, without suggesting that a consumer obtain a particular card or assisting a consumer with obtaining a particular card, will not be engaging in an activity that requires a credit licence.¹⁶⁹

Co-branded supplier of goods or services – where a supplier of goods or services is performing credit activities on behalf of a linked credit provider¹⁷⁰ in respect of a credit card that is branded or co-branded in the name of the supplier, the supplier will be exempt from the credit licensing requirements in the NCCP Act. The relevant NCCP Act licensing obligations sit with the linked credit provider.¹⁷¹

Credit card networks – there will be a contractual relationship between the credit provider and a credit card network giving the bank's card access to the credit card payment facilities of that network.

4.3.3 Car loans



Clinton visits a car dealer to buy a car. Once Clinton has identified the car he wants, the *dealer* suggests to Clinton that she could arrange finance for the purchase. Clinton agrees and, through the dealer, *Clinton* enters into a loan for the purchase of the car with a major bank. The car dealer relies on the *point of sale exemption* from holding a credit licence.

Dealers that recommend finance – dealers that recommend or assist a particular credit provider will be credit assistance providers under the NCCP and must therefore disclose commissions payable for the recommendation.¹⁷² Dealers will be exempted (the ‘point of sale’ exemption) from licensing under the NCCP and its associated obligations where they act on behalf of a ‘linked credit provider’¹⁷³ in arranging car finance for their customers.

Car finance broker – a car finance broker is usually a credit assistance provider with associated obligations under the NCCP.

Credit provider – the ultimate credit provider will be subject to responsible lending obligations for the transaction.¹⁷⁴

¹⁶⁹ ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (October 2017) [77]. Such website fall within the licensing exceptions in NCR reg 24(6), (7) and (8).

¹⁷⁰ NCC s 127; NCR reg 25C.

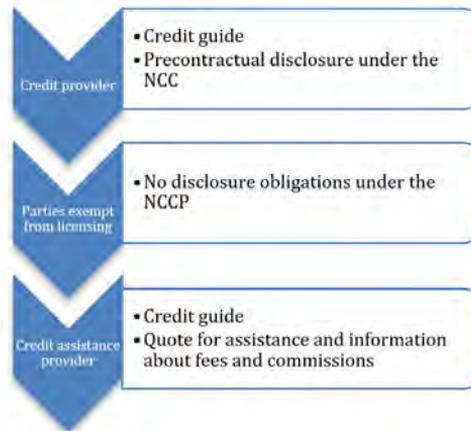
¹⁷¹ NCR reg 23A.

¹⁷² See also ASIC 17-301MR ‘ASIC bans flex commissions in car finance market’ (7 September 2017).

¹⁷³ NCC s 127; NCR Reg 25B.

¹⁷⁴ See *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2018] FCA 155 (credit provider breached responsible lending obligations in relying on pay slips and information from car finance brokers were known to be unreliable).

4.4 Disclosure by credit licensees



Carla enters into a loan through her broker. The documents given to Carla state that the broker provides credit assistance advice as a franchisee of the non-bank lender and that the loan will be provided by a major bank as credit provider, with the non-bank lender acting as its representative.

In principle, a consumer should be able to identify the entities involved in a credit transaction, their legal status as credit licensees, and through this status their obligations under legislation, along with any arrangements for commissions or fees, through the responsible lending disclosure obligations under the NCCP.¹⁷⁵

In particular:

- A credit provider is required to provide to consumers a credit guide including the licensee's name, contact details and Australian credit licence number and information about the licensee's obligations under the NCCP.¹⁷⁶
- A credit provider is also subject to extensive pre-contractual disclosure obligations under the NCC.¹⁷⁷
- A credit assistance provider is required to provide to consumers a credit guide including information about its name and contact details, Australian credit licence number, the credit providers that the licensee conducts the most business with when providing credit assistance in relation to credit contracts, and any commissions that it is likely to receive, directly or indirectly, from credit providers in relation to the credit assistance.¹⁷⁸

¹⁷⁵ For more on the disclosure obligations under the NCCP and NCC see below 5.7 and 7.3.

¹⁷⁶ NCCP Act s 126.

¹⁷⁷ NCC Part 2 div 1.

¹⁷⁸ NCCP Act s 113 and also NCR reg 27. See also NCCP Act s 121 and NCR reg 28E for disclosure requirements relating to the amount of any fees or commissions payable.

- Credit assistance providers must also provide a credit quote¹⁷⁹ with information about fees, charges and commissions payable by the consumer to the credit assistance provider.¹⁸⁰
- Credit representatives must provide consumers with a copy of the credit guide of the licensee they represent and their own credit guide, in similar form to that required from credit assistance providers.¹⁸¹
- Parties who are acting as intermediaries without providing credit assistance are not subject to the responsible lending or the disclosure requirements under the NCCP.¹⁸² However, fees and commissions payable to third parties (including those acting as intermediaries) must be disclosed by credit assistance providers.¹⁸³

Disclosure is not a perfect mechanism for assisting consumers to understand the identity and status of and relationship between the persons involved in a credit transaction.¹⁸⁴ As can be seen from the above summary, the disclosure will come in different forms and relate to different aspects of the transaction. It may use technical language. It may not directly identify the entities involved in a credit transaction who are not required to be licensed.

This leaves consumers open to be surprised by some aspects of the relationships between the business entities involved in consumer credit.¹⁸⁵

There remain other statutory protections for consumers. The entities with which a consumer will have the closest relationship – the credit provider (lender) and any credit assistance provider (brokers and advisers) - will be subject to the disclosure, responsible lending and conduct obligations under the NCCP and, in the case of the credit provider, the NCC Act.¹⁸⁶ Credit licensees also have supervisory responsibilities over the entities who act as their representatives.¹⁸⁷ All entities involved in providing credit will also be subject to the general or ‘safety net’ consumer protection provisions in the ASIC Act (or the ACL).¹⁸⁸

¹⁷⁹ NCCP Act ss 114 and 137.

¹⁸⁰ NCCP Act ss 121 and 144.

¹⁸¹ NCCP Act s 158 and NCR reg 27A and 27B. See also NCR reg 28P (credit guide exemption for credit representative who is a franchisee of the licensee it represents and subject to the policies of the licensee).

¹⁸² But note that if a licensee who is a mortgage manager or a product designer provides credit assistance to a consumer then the credit guide of those entities and the credit provider must disclose that relationship: NCR regs 26A and 26B.

¹⁸³ NCCP Act ss 121 and 144. See also the prohibition on a credit assistance provider profiting from the reimbursement of fees paid to third parties in NCCP Act ss 122 and 145.

¹⁸⁴ See also Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (Jan 2018) pp 29-30.

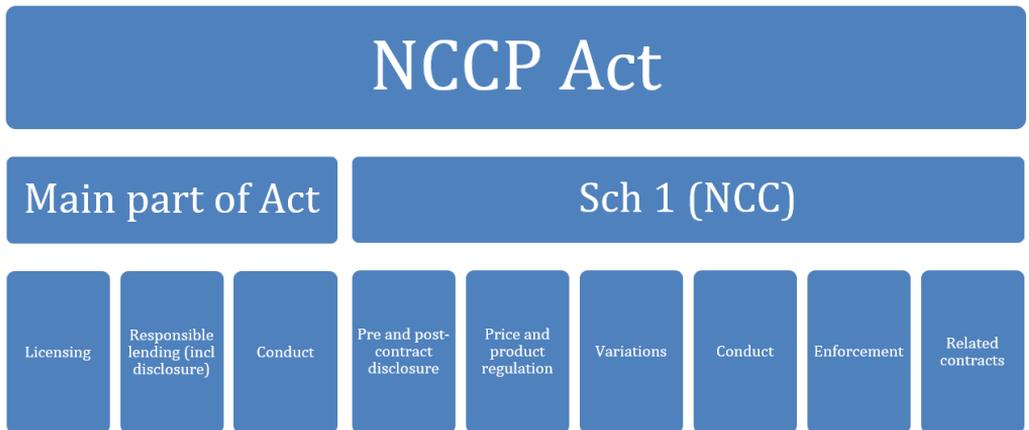
¹⁸⁵ Eg consumers may be surprised by the high proportion of brokers and aggregators owned by lenders, including bank lenders: Productivity Commission Draft Report *Competition in the Australian Financial System Overview & Draft Recommendations* (Jan 2018) pp 100, 211.

¹⁸⁶ See below Parts 5 and 6.

¹⁸⁷ See NCCP Act s 47.

¹⁸⁸ See below Part 8.

5 The National Consumer Credit Protection Act (NCCP Act), incorporating the National Credit Code (NCC)



The NCCP Act gives effect to the Council of Australian Governments' agreements of 26 March and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth. The NCCP Act includes (in Schedule 1) the National Credit Code (NCC). The text of the NCC is very similar to the text of the former Uniform Consumer Credit Code, although some changes have been made.

5.1 To whom does the NCCP Act apply?

The NCCP Act applies to persons who engage in a 'credit activity'.¹⁸⁹ This definition includes a person who is a 'credit provider'¹⁹⁰ under a 'credit contract', a 'lessor'¹⁹¹ under a 'consumer lease'¹⁹², provides a credit service in the form of 'credit assistance'¹⁹³ or is 'acting as an intermediary'.¹⁹⁴ See above Part 4 for more on these roles.

Credit contract is defined in the NCC. A regulated 'credit contract' for the purposes of both the NCC and the NCCP Act is a contract where:

1. the debtor is a natural person or a strata corporation, and
2. the credit is to be provided or intended to be provided:
 - wholly or predominantly for personal domestic or household purposes or
 - to purchase, renovate or improve residential property for investment purposes or
 - to refinance credit used for such purposes, and

¹⁸⁹ NCCP Act s 6.

¹⁹⁰ NCC s 204.

¹⁹¹ NCC s 204.

¹⁹² NCC pt 11.

¹⁹³ NCCP s 8.

¹⁹⁴ NCCP Act s 9.

3. a charge is or may be made for providing the credit, and

the credit provider carries on the business of providing credit in this jurisdiction or provides credit as part of or incidentally to any other business carried on in the relevant jurisdiction.¹⁹⁵

5.2 The main consumer protection provisions of the NCCP Act

The NCCP Act includes:

- a licensing regime for those engaging in credit activities and their representatives;
- general conduct obligations;
- mandatory disclosure requirements; and
- responsible lending obligations (discussed in section 6).

5.3 Licensing

5.3.1 Required for credit activities

Licensing protects consumers by setting prerequisites that business must meet in order to be able to engage in credit activities, which are controlled and monitored by the regulator. Under the NCCP Act, persons are prohibited from engaging in credit activities unless they hold an Australian Credit Licence.¹⁹⁶

There are a number of exceptions to the licensing requirement, most pertinently in this context the obligations to hold a credit licence does not apply to:

- a person engaging in credit activities as a representative (including as an authorised credit representative) of a licensee;¹⁹⁷
- a point of sale supplier of goods or services;¹⁹⁸ or
- an issuer of a credit card that is co-branded with a credit licensee.¹⁹⁹

Applications for credit licences are assessed by ASIC²⁰⁰ and ASIC may impose conditions on, vary or revoke a licence.²⁰¹

¹⁹⁵ NCC s 4.

¹⁹⁶ NCCP Act s 29. See eg *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18; *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2.

¹⁹⁷ NCCP Act s 29(3).

¹⁹⁸ *National Credit Regulations 2010* ss 23 and 23A.

¹⁹⁹ *National Credit Regulations 2010* ss 23 and 23A.

²⁰⁰ NCCP Act Part 2-2 Div 3.

²⁰¹ NCCP Act s 45, and also s 46.

5.3.2 Consequences of non-compliance

Contravention of the responsible lending and disclosure obligations under the NCCP, and of most of the obligations under the NCC, gives rise to liability for civil, and in some instances criminal, penalties.²⁰² A consumer who has suffered loss or damage as a result of a contravention may seek damages and other compensatory orders.²⁰³ Remedies can be pursued directly against a relevant licensee, regardless of any contractual relationship between the parties.

The general conduct obligations in the NCCP Act (discussed below) are not penalty provisions and therefore consumers have no right to statutory remedies for breach. Contravention of the licensing obligations can be a ground for ASIC to suspend or cancel a licensee's licence.²⁰⁴

Other grounds for suspending or cancelling a licence include where ASIC has reason to believe that a licensee is likely to contravene a licence obligation, or that the licensee is not a fit and proper person to engage in credit activities, or that the licence application was false in a material particular or materially misleading, or omitted a material matter.²⁰⁵ These factors may also be relevant to a decision by ASIC to make a banning order preventing a person from engaging in credit activities (or specified credit activities).²⁰⁶

5.4 General conduct obligations

5.4.1 Overview of general conduct obligations

A credit licensee is subject to general conduct obligations, including to:

- a. do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
- b. have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives; and
- c. comply with the conditions on the licence; and
- d. comply with the credit legislation; and
- e. take reasonable steps to ensure that its representatives comply with the credit legislation; and
- f. maintain the competence to engage in the credit activities authorised by the licence; and

²⁰² NCCP Act Ch 4. Following a recommendation from the 2014 Financial System Inquiry, the Government has released an exposure draft of amendments to the NCCP Act that would give ASIC the power to make product intervention orders where a credit product has resulted in, or will, or is likely to, result in significant detriment to consumers: *Exposure Draft Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017*, sch 2 (proposed s 301C NCCP Act).

²⁰³ NCCP Act ss 178, 179, 180, 180A. Also NCC ss 118, 124.

²⁰⁴ NCCP Act s55(1)(a).

²⁰⁵ NCCP Act s55(1).

²⁰⁶ NCCP Act s80(1).

- g. ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; and
- h. have an internal dispute resolution procedure ...; and
- i. be a member of an approved external dispute resolution scheme; and
- j. have compensation arrangements ...; and
- k. have adequate arrangements and systems to ensure compliance ...; and
- l. have available adequate resources to engage in the authorised activities and adequate risk management systems (unless regulated by APRA); and
- m. comply with any other obligations prescribed by the regulations.²⁰⁷

ASIC has described the licensing obligations as comprising ‘broad compliance obligations’ and ‘other general conduct obligations’.²⁰⁸ The broad compliance obligations are the obligations to:

- 1. do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly;
- 2. comply with licence conditions; and
- 3. comply with the credit legislation.²⁰⁹

ASIC considers these broad compliance obligations to be both stand-alone obligations and obligations that encompass other general conduct obligations.²¹⁰ This means that the broad compliance obligations can be breached even if there is no breach of the general conduct obligations.²¹¹

The general conduct licensing obligations in NCCP Act are similar to those imposed on financial services licensees under the *Corporations Act*, including the obligation to engage in relevant activities ‘efficiently, honestly and fairly’²¹² and in respect to conflicts of interest.²¹³ Some of the court’s decisions on the *Corporations Act* obligations will be relevant here.

5.4.2 Obligations to engage in credit activities ‘efficiently, honestly and fairly’

A credit licensee must ‘do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly’.²¹⁴

²⁰⁷ NCCP Act s 47. See also ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) and ASIC Regulatory Guide 206 *Credit licensing: Competence and training* (December 2016).

²⁰⁸ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [51].

²⁰⁹ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [45]. Note that the ASIC Regulatory Guide seems to include a reference to an incorrect section number for the obligation to comply with licence conditions.

²¹⁰ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [59].

²¹¹ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [59].

²¹² *Corporations Act 2001* s 912A(1)(a).

²¹³ *Corporations Act 2001* s 912A(1)(aa).

²¹⁴ NCCP Act s 47(1)(a).

As noted above, ASIC regards this as a ‘broad compliance obligation’²¹⁵ and there must be measures in place for ensuring compliance on an ongoing basis. ASIC considers that the adequacy of a licensee’s obligations under this paragraph will be based on the nature, scale and complexity of the business: ‘As a general rule, the smaller and simpler your business, the smaller and simpler we expect your measures to be.’²¹⁶ It is clear that the obligation calls for conduct that meets all three criteria. Unfair or dishonest conduct cannot be justified on the grounds of efficiency.²¹⁷

Financial services licensees are subject to a similar general conduct obligation under s 912A of the *Corporations Act* to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’.²¹⁸

Section 912A of the *Corporations Act* was considered in *Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (in Liquidation)*.²¹⁹ Foster J accepted the submissions of ASIC that:

- a. The words “efficiently, honestly and fairly” must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty...
- b. The words “efficiently, honestly and fairly” connote a requirement of competence in providing advice and in complying with relevant statutory obligations ... They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client’s affairs...
- c. The word “efficient” refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate... Inefficiency may be established by demonstrating that the performance of a licensee’s functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect...

²¹⁵ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [45]–[46].

²¹⁶ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [53].

²¹⁷ *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [2.113].

²¹⁸ *Corporations Act 2001* s 912A(1)(a).

²¹⁹ (2012) 88 ACSR 206.

- d. It is not necessary to establish dishonesty in the criminal sense... The word “honestly” may comprehend conduct which is not criminal but which is morally wrong in the commercial sense...
- e. The word “honestly” when used in conjunction with the word “fairly” tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound...²²⁰

Contraventions of other conduct obligations applying to the licensee may combine to constitute ‘sufficiently serious departures from reasonable standards of performance of advice that they [involve] a failure to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly’.²²¹ Indeed, contravention of the obligation may be assessed over a period of time rather than by focus on a particular incident.²²² ASIC suggests that a breach of the obligation may also arise from a breach of a licensee’s contractual obligations to its clients.²²³

In *Australian Securities and Investments Commission v Financial Circle Pty Ltd* Moshinsky J held that a financial services licensee who exploits its client’s position of ‘financial difficulty’ will not be acting fairly for the purposes of s 912A of the *Corporations Law*.²²⁴ It would appear that there might often be scope for considerable overlap between this conduct standard and the prohibition in the ASIC Act on unconscionable conduct, which is concerned with conduct that amounts to moral obloquy or offends community standards.²²⁵ Unlike the licensing conduct obligation to provide services ‘efficiently, honestly and fairly’, contravention of the statutory prohibition on unconscionable conduct gives rise to liability to pay compensation for loss or damage and civil pecuniary penalties.²²⁶

5.4.3 Duty to ensure consumers are not disadvantaged by conflicts of interest

The general conduct licensing obligations under the NCCP Act provide that a credit licensee:

‘must have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives’.²²⁷

...

In considering whether [these arrangements are] adequate, the nature, scale and complexity of the credit activities engaged in by the licensee must be taken into account.²²⁸

²²⁰ (2012) 88 ACSR 206, [69]-[70] (citations omitted). Cited with approval in *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, [674] (Edelman J). See *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661.

²²¹ *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, [674] (Edelman J). See also *ASIC v Wealth & Risk Management (no 2)* [2018] FCA 59, [113] (Moshinsky J). See also ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [59].

²²² *Commonwealth Bank of Australia v Doggett* [2014] VSC 423, [165].

²²³ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [62].

²²⁴ [2018] FCA 2, [93] and also *Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd* [2018] FCA 59.

²²⁵ See also *Australian Securities and Investments Commission v National Australia Bank Limited* [2017] FCA 1338.

²²⁶ ASIC Act part 2, div 2, subdiv G.

²²⁷ NCCP Act s 47(1)(b).

There is no determinative case law in Australia on this provision,²²⁹ or indeed the related issue of general law fiduciary duties applying to credit licensees.²³⁰ In trying to work out how the conflict of interest general licensing obligation in NCCP Act s 47(1)(b) will work in practice, there would seem to be three interrelated questions to consider. These questions are: when will a conflict of interest arise under the NCCP Act; how should a credit licensee ensure that a consumer is not disadvantaged by a conflict of interest; and what is the relationship between the statutory duty on conflicts of interest and general law fiduciary duties?

(i) *When will a conflict of interest arise for the purposes of the statutory obligation?*

Under general law conflicts of interest rules are associated with fiduciaries.²³¹ Fiduciaries owe a duty of utmost loyalty²³² and must avoid a conflict of between their duties to their clients and their own interests or duties owed to other clients.²³³

One possible interpretation of the conflict of interest general licensing obligation in s 47(1)(b) NCCP Act is that it applies to conflicts of interest arising where there is a fiduciary relationship under general law. This approach is unlikely to be adopted because it would give only a very narrow and uncertain scope to the obligation. Fiduciary obligations in this context are determined on a factual basis and so it is unclear when a particular credit licensee will be considered a fiduciary.

Another interpretation is that the obligation applies in circumstances where an interest of the credit licensee conflicts with a legal obligation or duty owed to consumers by ‘statute, general law or contract’.²³⁴ This is the interpretation taken in the Explanatory Memorandum and by ASIC.²³⁵ The question then arises as to what types of duties would lead to a conflict for the purposes of s 47(1)(b).

Under the *Corporations Act* financial services licensees providing advice to retail clients must take reasonable steps to act in the ‘best interests’ of those clients.²³⁶ This duty applies

²²⁸ NCCP Act s 47(2).

²²⁹ See only *Dimitropoulos and Australian Securities and Investments Commission (Taxation)* [2017] AATA 1513 (19 September 2017).

²³⁰ PW Young, ‘Recent Cases’, *Informed Consent* (2008) 82(3) *Australian Law Journal* 165.

²³¹ On identifying a fiduciary relationship see *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41.

²³² *Gibson Motorsport Merchandise Pty Limited v Forbes* (2006) 149 FCR 569 [11] (Finn J).

²³³ *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392 (Davies, Sheppard and Gummow JJ). On the fiduciary duties of a financial adviser see also *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Aequitas v Sparad (No 100) Ltd* [2001] NSWSC 14; S Coronas and T Galloway, ‘The Effectiveness of The Best Interests Duty –Enhancing Consumer Protection?’ (2013) 41 *Australian Business Law Review* 5; S Degeling and J Hudson, ‘Fiduciary Obligations, Financial Advisers and FOFA’ (2014) 32 *Companies and Securities Law Journal* 527.

²³⁴ *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [2.117]; ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [80].

²³⁵ *National Consumer Credit Protection Bill: Explanatory Memorandum 2009* [2.117]; ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [80].

²³⁶ *Corporations Act 2001* s 961B, introduced under the future of financial advice reforms in 2012. On this obligation see *ASIC v NSG Services Pty Ltd* [2017] FCA 345, [4]-[31]; *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2, [93]; *ASIC v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59.

to create a positive obligation to advance the interests of the consumer client.²³⁷ There is no equivalent duty in the NCCP Act. The main duties owed by credit licensees to consumers under the NCCP Act relate to disclosure and responsible lending.²³⁸ Credit licensees are also subject to a duty under the ASIC Act to provide any financial service with due care and skill.²³⁹ The conflicts obligations in s 47(1)(b) would accordingly apply in situations, among others, where the interests of a credit licensee conflict with its duty in assessing that credit is not unsuitable for a consumer and to provide its services with due care and skill.

(ii) *How should a credit licensee ensure that a consumer is not disadvantaged by a conflict of interest?*

Financial services licensees are subject to a similar duty under the *Corporations Act* to ‘have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative’.²⁴⁰ The duty under the *Corporations Act* is to have in place adequate arrangements to ‘manage’ conflicts of interest.²⁴¹ Under the NCCP Act a credit licensee must ensure consumers are not ‘disadvantaged’ by conflicts of interest. This use of language seems to suggest a higher level of care is required from credit licensees in respect to conflicts of interest, without going so far as to suggest that conflicts must be eliminated altogether.²⁴²

Some examples illustrate the issue:

(a) Preferring commissions over responsible lending duties

A credit representative [of a broker] will receive a remuneration bonus for arranging a certain number of loans per month. To meet that number, the credit representative places borrowers in credit contracts that are unsuitable.²⁴³

In this scenario, the broker through its credit representative will be in breach of the responsible lending requirements not to recommend ‘unsuitable credit’.²⁴⁴ It might also be said that there is a conflict between the credit representative’s responsible lending duties and interests in receiving the remuneration bonus. ASIC suggests that the appropriate response to this kind of scenario is as follows:

²³⁷ R Baxt, A Black and P Hanrahan, *Securities and Financial Services Law* (9th ed, Lexis Nexis, Butterworths, 2017) [14.55.]

²³⁸ NCCP Act ch 3.

²³⁹ ASIC Act s12ED(1).

²⁴⁰ *Corporations Act* s 912A(1)(aa). See also Stephen Corones and Tom Galloway, ‘The Effectiveness of The Best Interests Duty –Enhancing Consumer Protection?’ (2013) 41 *Australian Business Law Review* 5.

²⁴¹ *Corporations Law* s 912A(1)(aa). Note also the ban on ‘conflicted remuneration’ in ss 936E, 963G-963H.

²⁴² See *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* (No 4) (2007) 160 FCR 35, [445] (Jacobson J) (‘the phrase “management of conflicts of interest” assumes that there will be potential conflicts which must be managed by adequate arrangements rather than totally eliminated’).

²⁴³ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [82]- [83].

²⁴⁴ See below Part 7.

‘Where the broker is aware of the risk of representatives acting in such a way, the licensee should have adequate arrangements and reasonable procedures to address it ensuring that its clients are not disadvantaged by the conflict. The adequacy of arrangements depends on the circumstances of each case.’²⁴⁵

Of course, one way to do this would be to remove the commission structure that created the incentive for the credit representative to act outside the responsible lending obligations.²⁴⁶ Another response would be increased supervision. Here the credit licensee’s response to the conflicts obligation in 47(1)(b) NCCP Act overlaps with the licensee’s obligations to ‘take reasonable steps to ensure that its representatives comply with the credit legislation’²⁴⁷ and to ‘ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence’.²⁴⁸

(b) Limited pool of recommendations

In making credit recommendations to its consumer clients, a broker draws on a pool of five credit providers who pay the broker a commission. The broker does not recommend products from credit providers outside this list.

Does a broker/credit assistance provider have a conflict in basing recommendations only on a pool of credit providers who will pay a commission?²⁴⁹ As already noted, under the *Corporations Act* a financial services licensee must act in the ‘best interests’ of the client.²⁵⁰ There is no equivalent duty owed under the NCCP that might form the basis of the conflict rule in this scenario. Perhaps the failure to consider other providers is a breach of the duty of due care and skill,²⁵¹ but it is not clear this duty goes to the choice of providers to consider for a recommendation as opposed to the care in making the recommendation itself.

If there is a conflict, what steps in this scenario must the broker take to ensure clients are not disadvantaged as required under s 47(1)(b)? Under the general law a fiduciary will be ‘absolved’ from what would otherwise be a breach of duty by obtaining ‘fully informed consent’²⁵² This consent requires full disclosure of the relevant circumstances.²⁵³ The NCCP requires credit assistance providers to disclose fees and commissions that may be paid to it

²⁴⁵ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [82]- [83].

²⁴⁶ On concerns about the remuneration of brokers and the impact of these structures on good consumer outcomes see also *ASIC Report 516: Review of mortgage broker remuneration* (2017).

²⁴⁷ NCCP Act s 47(1)(e).

²⁴⁸ NCCP Act s 47(1)(g).

²⁴⁹ See also *Dimitropoulos and Australian Securities and Investments Commission (Taxation)* [2017] AATA 1513 (19 September 2017).

²⁵⁰ *Corporations Act 2001* s 961B (in providing advice). See eg *ASIC v NSG Services Pty Ltd* [2017] FCA 345; *ASIC v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59.

²⁵¹ ASIC Act s 12 ED(1).

²⁵² *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited (ACN 113 114 832) (No. 4)* [2007] FCA 963 [293] (Jacobson J), citing *Commonwealth Bank of Australia v Smith* (1993) 42 FCR 390, 393.

²⁵³ *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22 [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

by a credit provider²⁵⁴ or other party in connection with that assistance.²⁵⁵ Disclosure is also required if the credit assistance provider conducts business only with a small group of credit providers.²⁵⁶ Is this disclosure sufficient for the purposes of the duty as to conflicts? There is certainly no express obligation in the statute to ensure that clients understand the implications of the information provided.

Nonetheless, the language of the statutory obligation suggests more than mere disclosure to protect clients from disadvantage arising from a conflict of interest. The need for positive steps to ensure the broker draws from a representative product list is suggested by ASIC, which suggests that it:

‘would expect that licensees providing credit assistance in relation to third party loans should have a suitably comprehensive product list. We expect that this list will be thoroughly researched and reasonably representative of the products available on the market.’²⁵⁷

(iii) *What is the relationship with general law fiduciary duties?*

There is a question as to whether the general law governing fiduciary relationships may continue to apply to credit licensees (where relevant) or whether its operation is excluded by the existence of the statutory regime. The statutory and the fiduciary conflicts of interest regimes are not coextensive. For example:

- Under general law, a credit licensee such as a broker will not necessarily be in a fiduciary relationship with a consumer.²⁵⁸ Yet under the NCCP Act s 47(1)(a) all credit licensees must ensure conflicts of interest do not disadvantage their clients.
- Under the general law, a fiduciary must not make an unauthorised profit from the relationship with its client. Under the NCCP Act a credit licensee may be paid commissions but, in most cases, must disclose these payments to the client.²⁵⁹
- Under general law, a fiduciary must avoid conflicts of interests, subject to informed consent by the client.²⁶⁰ Under the NCCP Act the obligation is to avoid *disadvantage* to clients, which as we have seen is a different type of obligation.

²⁵⁴ Even where a commission is paid to a broker by a credit provider, the broker is likely to be the agent of the consumer: *Octapon Pty Ltd v Esanda Finance Corp Ltd* (unreported, NSW Sup Ct, Cole J, 3 February 1989) pp 27-28 (Cole J); *Custom Credit Corp Ltd v Lynch* [1993] 2 VR 469; *Esanda Finance Corp Ltd v Spence Financial Group Pty Ltd* [2006] WASC 177; *Perpetual Trustees Victoria Ltd v Ford* (2008) 70 NSWLR 611.

²⁵⁵ ASIC Act s 113 and 114.

²⁵⁶ NCCP Act s 113(2)(g).

²⁵⁷ ASIC Regulatory Guide 205 *Credit licensing: General conduct obligations* (June 2010) [84].

²⁵⁸ On identifying a fiduciary relationship of trust and confidence see eg *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, [177]; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97. Compare, treating a broker as a fiduciary, for the purpose of assessing whether commissions payable to the broker should have been disclosed to the consumer: *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351 (conceded that broker was a fiduciary); *McWilliam v Norton Finance (UK) Ltd (in liquidation)* [2015] EWCA Civ 186; [2015] 1 All ER (Comm) 1026; *Nelmes v NRAM plc* [2016] EWCA Civ 491. But cf *Commercial First Business Ltd v Pickup & Vernon* unrep, Ch Div, Manchester District Registry, 6th December 2016).

²⁵⁹ See especially NCCP Act ss 113-114.

²⁶⁰ On informed consent see *Maquire v Makaronis* (1997) 188 CLR 449, 466 ((Brennan CJ, Gaudron, McHugh and Gummow JJ); *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22 [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

To the extent that the duties imposed in a fiduciary relationship under the general law are incompatible with the obligations imposed under statute, the latter will prevail. But does the presence of the statutory regime of obligations covering similar and overlapping ground to fiduciary law exclude the scope for the operation of that body of general law?

Unlike the *Corporations Act*, there is no general provision in the NCCP Act expressly preserving the operation of the general law.²⁶¹ Nonetheless, given clear words are usually required for statutes to remove common law rights, both bodies of law may co-exist as far as is practicable and possible.

At general law a party may use its contract to exclude any fiduciary duties.²⁶² It is possible that an exclusion term of this type in a contract between a credit licensee and a consumer would be void as unfair under the ASIC Act.²⁶³

5.5 Other NCCP Act conduct obligations

The NCCP Act includes a range of other provisions that constrain the conduct of licensees or the features of credit products. These include the following.

5.5.1 Unfair or dishonest conduct by credit service providers

Section 180A of the NCCP Act gives the court the power to make orders to remedy unfair or dishonest conduct by credit service providers.²⁶⁴ The relevant provision includes a list of factors that a court must consider when determining whether the conduct is unfair or dishonest.²⁶⁵ These factors have some similarity with the factors relevant for assessing unjust transactions,²⁶⁶ however, they are not identical. Although this provision appears designed to address similar conduct as that addressed in the NCC, it is directed at credit service providers (which includes credit assistance providers and persons acting as intermediaries), whereas the unjust transactions regime in the NCC is directed at the conduct of credit providers. To our knowledge, the scope of this provision has not yet been tested in litigation.

5.5.2 Credit card interest and fees

The NCCP Regulations impose an obligation on credit providers to take reasonable steps to warn a consumer if the licensee becomes aware that the consumer has used the credit card in excess of the credit limit, and the warning must be provided within two days of the licensee becoming aware.²⁶⁷ The obligation arises only once in any statement period, even if the consumer exceeds the limit on more than one occasion.²⁶⁸

Also, the NCCP Act and Regulations impose restrictions on the imposition or calculation of fees, charges and interest rates:

²⁶¹ Compare *Corporations Act 2001* s 960A: ‘The obligations imposed on a person under this Part are in addition to any other obligations to which the person is subject under this Act or any other law’.

²⁶² *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* (ACN 113 114 832) (No. 4) [2007] FCA 963 [278] (Jacobson J).

²⁶³ See below part 8.6.

²⁶⁴ NCCP Act s 180A(1).

²⁶⁵ NCCP Act s 180A(4).

²⁶⁶ NCC s 76.

²⁶⁷ NCCP Act s 133BH, NCR reg 28LJ(1), (2). Note that there is no need to provide the warning if the consumer repays the amount within that 2 day period: reg (3).

²⁶⁸ NCCP Act s 133BH, NCR reg 28LJ(4).

- A credit provider can impose a fee or charge, or a higher rate of interest, if a credit card is used to obtain cash, goods or services above the credit limit, but only if the consumer provides express consent to the imposition of such fees, charges or interest rates in these circumstances.²⁶⁹ In addition, the credit provider must allow the consumer to withdraw that consent at any time.²⁷⁰
- A credit provider must apply a payment under a credit card contract in a manner specified by the consumer (if the credit provider consents), and, subject to such agreement, must otherwise pay the payment towards the closing balance. If there are different annual percentage rates applicable to different parts of the closing balance, the payment must be made first to the part with the highest interest rate.²⁷¹
- Changes to the NCCP Act will also prohibit the backdating of interest charges to payments that have been made within the interest free period.²⁷² These changes will come into effect on 1 January 2019.
- Further changes will prohibit a credit provider from entering a credit card contract if the debtor does not have a credit card termination entitlement under the contract.²⁷³ These changes are consistent with existing provisions in the NCC that allow the debtor to pay out a credit contract at any time.²⁷⁴ Credit providers will be required to allow consumers to make the request online. These amendments will come into effect on 1 January 2019.

5.6 NCCP Act mandatory disclosure obligations

There are various mandatory disclosure documents that are required before or during the course of a transaction, or during the life of a credit contract. These various disclosure obligations are imposed by the NCCP Act and by the NCC. In the NCCP Act, the disclosure obligations have a focus on pre-contractual disclosure of the nature and role of the entity or entities with whom a consumer is dealing, although there are also some product-specific disclosure obligations. In contrast, the NCC disclosure obligations focus on the features of a particular credit contract. The NCCP Act and NCC disclosure obligations commonly require the disclosure document to be a written document, or to be provided in writing. However, electronic communication of most mandatory disclosure documents under the NCCP Act and NCC is facilitated by the legislation.²⁷⁵ Consumer consent to electronic communication of disclosure documents is required.

5.6.1 Credit Guide

The main disclosure obligation in the NCCP Act is to provide a ‘credit guide’. The purpose of this document is ‘to provide the consumer with key information early in the credit transaction so that they are informed and aware of necessary matters before deciding to use

²⁶⁹ NCCP Act s 133BI(1), (2). See also NCR reg 28LK on the form used to obtain consent.

²⁷⁰ NCCP Act s 133BI(5).

²⁷¹ NCCP Act part 3-2b, div 6. See also NCR reg 28LM.

²⁷² *Treasury Laws Amendment (Banking Measures No 1) Act 2018* sch 5, pt 3.

²⁷³ *Treasury Laws Amendment (Banking Measures No 1) Act 2018* sch 5, pt 4.

²⁷⁴ NCC ss 26, 82.

²⁷⁵ See NCC ss 184(2), 187; NCR reg 28L. See also *Electronic Transactions Act 2000* (Cth) s 9; *Electronic Transactions Regulations 2000* part 3 (providing specific rules about electronic communications under the NCCP Act).

the services of the credit assistant.²⁷⁶ Although this explanation of the role of credit guides in the Explanatory Memorandum refers specifically to credit assistants, the obligation to provide a credit guide is imposed on credit licensees that are:

- credit providers;²⁷⁷
- credit assistance providers;²⁷⁸ and
- credit representatives.²⁷⁹

A credit guide for a credit provider or credit assistance provider must include: the name, contact details and licence number of the issuer of the Guide; information about dispute resolution procedures, including contact details for the relevant EDR scheme; information about the right to request a copy of the suitability statement; and information about the licensee's obligation not to offer or assist with unsuitable credit.²⁸⁰ Credit assistance providers must also include information about fees, commissions, and the names of the most common credit providers with which they do business.²⁸¹

5.6.2 Additional documents for credit assistance providers

In addition to a credit guide, credit assistance providers must provide a quote for the assistance²⁸² and a credit proposal document (information about fees, charges and commissions, and likely amount of credit to be offered).²⁸³

5.6.3 Timing of disclosure

The credit guide²⁸⁴ and credit quote²⁸⁵ must be provided to the consumer before the credit contract is entered or credit assistance provided, while the Credit Proposal document must be provided at the same time as providing credit assistance to the consumer.²⁸⁶

5.6.4 Disclosure for specific products: home loans, credit cards, car loans.

Although consumer credit legislation has been designed to be applicable to all forms of consumer credit, in more recent times, additional obligations (including disclosure obligations) have been introduced for some products.²⁸⁷

Amendments to the NCCP Act in 2012 introduced an obligation on licensees to provide 'Key Fact Sheets' for home loans and credit cards. The objective of the Key Facts Sheets is to facilitate comparison between products, including between products from different lenders. As noted in the Explanatory Memorandum:

²⁷⁶ *Consolidated Explanatory Memorandum, National Consumer Credit Protection Bill 2009* [3.36].

²⁷⁷ NCCP Act s 126.

²⁷⁸ NCCP Act s 113.

²⁷⁹ NCCP Act Part 3-5. See also Part 3-6 (debt collectors).

²⁸⁰ NCCPA Act ss113(2), 126(2).

²⁸¹ NCCPA Act ss 126(2)(e), (f), (g).

²⁸² NCCP Act ss 114 and 137.

²⁸³ NCCP Act ss 121 and 144.

²⁸⁴ NCCP Act ss 113, 126.

²⁸⁵ NCCP Act s114.

²⁸⁶ NCCP Act s 121.

²⁸⁷ See also NCCP Act s 133CB (small amount credit contracts) and NCCPA Act ss 133DB, DC, DE (reverse mortgages).

‘The Key Facts Sheet sets out, in a standardised format, pricing and other information about their products so that consumers can readily compare different home loans, especially in respect of their cost.’

The Key Facts Sheets were introduced as a response to the complexity of credit products, and were designed to standardise the provision of information so as to facilitate comparison between products from different suppliers. The obligations to provide or make available Key Facts Sheets are imposed only on credit providers. Credit assistance providers are not obliged to provide or make available Key Facts Sheets to consumers.

Home loans

In the case of home loans, credit providers are required to ensure that their website allows consumers to generate a Key Facts Sheet for the ‘standard home loans’ offered by that credit provider.²⁸⁸

The obligation only applies if the credit provider allows consumers to enquire about, or make an application for, a standard home loan through the website, however, in practice, it is likely that most or all lenders would at least allow for enquiries to be made through a website.

A ‘standard home loan’ is a standard form credit contract under which the licensee provides credit to purchase residential property or to refinance credit that has been provided wholly or predominantly to purchase residential property.²⁸⁹ The regulations also provide that a standard home loan can be a variable rate or fixed rate home loan, and that it must oblige the consumer to make repayments that repay principal and interest for the full term of the loan.²⁹⁰

The requirements for the content of a Key Facts Sheet for a standard home loan are primarily set out in the regulations.²⁹¹ Among other things, the Key Facts Sheet for a home loan must include the repayment method, repayment frequency, interest rate, and personalised comparison rate. It must also include information on the total amount to be repaid, fees, and information on what happens when a fixed rate term expires, or when interest rates change.

A Key Facts Sheet must also be provided to a consumer on request,²⁹² although there are some circumstances where this would not be required, for example, if the licensee has previously provided the consumer with a Key Facts Sheet, and the information has not changed.²⁹³

²⁸⁸ NCCP Act s 133AC(2).

²⁸⁹ NCCP Act s 133AA(1).

²⁹⁰ NCCP Regulation reg 28LA.

²⁹¹ See eg NCR reg 28LB (requirements about colour and size) and Schedule 5.

²⁹² NCCP Act s133AD(1).

²⁹³ NCCP Act s133AF(1).

Credit cards

Credit providers are also required to provide Key Facts Sheets for their credit cards contracts. A credit card contract is a continuing credit contract under which credit is ordinarily obtained only by the use of a credit card.²⁹⁴

For credit card issuers, the obligation is to ensure that the application form for a credit card that the licensee issues contains a Key Facts Sheet with up to date information.²⁹⁵ It is prohibited for a credit provider to enter into, or offer to enter into, a credit card contract unless the application has been made using a form that includes a Key Facts Sheet with up to date information.²⁹⁶ However, a credit provider can enter into a contract (or offer to enter into a contract) based on an application form that does not include an up to date Key Facts Sheet if the consumer is provided with the updated information, or the consumer has otherwise been provided with a Key Facts Sheet with up to date information.²⁹⁷

The content of a Key Facts Sheet is prescribed in the NCR.²⁹⁸ Requirements include disclosure of the minimum credit limit, minimum repayments, interest rates, and annual and late payment fees.²⁹⁹

6 Responsible lending

6.1 Background to the responsible lending regime

The responsible lending regime is one of the key changes to the consumer credit regime that applied before the NCCP Act. The regime was a response to the Global Financial Crisis and, in particular, the practice of lending to customers who should not have been considered as being able to repay their loans but were considered viable because of the security they were able to provide. In its 2008 Review of Australia's Consumer Policy Framework Report, the Productivity Commission concluded that 'those tasked with the detailed development of the new national regime for consumer credit should consider how 'responsible lending' issues might impact on the regulatory arrangements'.

'[The] distribution channels for credit to consumers (such as the use of various intermediaries) and the development of products such as no and low documentation loans have often placed the borrower at arm's length from the lender and have limited the documentation and inquiries regarding a consumer's financial position that lenders have before them, when deciding whether or not to approve an application. The consumer is in a position where they are dependent on the intermediary's skill and expertise. The level of regulation of market participants providing such services varies significantly from State to State.

[In addition the regulation impact statement developed in the preparation of the Finance Brokers Bill (NSW) documented in detail a number of undesirable market practices, supporting the introduction of responsible lending practices] including:

²⁹⁴ NCCP Act s 133BA(1). See also the definition of 'credit card' and 'credit card contract' in NCCP Regulation, reg 3.

²⁹⁵ NCCP Act s 133BC(1).

²⁹⁶ NCCP Act s 133BD(1)(a).

²⁹⁷ NCCP Act s 133BD(1)(b), (c).

²⁹⁸ NCR sch 6 (Model of Key Facts Sheet).

²⁹⁹ NCR sch 6.

- brokers recommending products that earned them higher commissions but which are inappropriate, higher cost or unaffordable for their clients;
- brokers misrepresenting the applicants' financial details so that the loan is approved, and the broker receives commissions, when, if the lender was aware of the borrower's actual financial position, they would reject the application;
- brokers 'upselling' loans to higher amounts to increase commissions; and
- brokers and lenders engaging in 'equity stripping', that is, arranging or providing high-cost loans for borrowers in financial difficulty (particularly those facing foreclosure of the family home), in the expectation that the borrower will default with subsequent transfer of the consumer's equity in their home to the broker and the lender through fees, charges and default interest'.³⁰⁰

The aim of the responsible lending reforms was to 'introduce standards of conduct to encourage prudent lending and leasing' in the consumer credit industry.³⁰¹

6.2 The standard of 'not unsuitable' credit

Gail Pearson has noted that since the financial crisis there has been a resurgence of interest in using substantive suitability standards to protect consumers.³⁰² Suitability suggests an element of 'fitness for purpose', a standard long used in sale of goods contexts. The central obligation under the responsible lending regime in the NCCP Act is to ensure that credit is 'not unsuitable' for a consumer. The use of a double negative in describing the required protective standard is awkward. The phrasing may emphasise that the standard is based on a lower bar than what would be best,³⁰³ or most 'appropriate' for a consumer.³⁰⁴

Here a contrast may be drawn with the duty in the *Corporations Act* on financial service providers a duty to act in the 'best interests' of a client when providing personal advice to a retail client.³⁰⁵ The *Corporations Act* does not restrict the ways in which a financial services provider can meet this duty, however, it provides that the duty will be satisfied if the provider takes specified steps, including identifying the objectives, financial situation and needs of the client, making reasonable inquiries if information provided was incomplete or inaccurate, and conducting a reasonable investigation into the products that might achieve the client's relevant objectives and needs.³⁰⁶ The resulting advice must be 'appropriate' to the client.³⁰⁷

There are some similarities in the approach taken under the *Corporations Act* (for advisers) and the responsible lending obligations in the NCCP Act. Both regimes require the gathering of information about the client's needs and objectives, and an assessment of

³⁰⁰ NCCP Act *Explanatory Memorandum* [3.9]-[3.11].

³⁰¹ NCCP Act *Explanatory Memorandum* [3.16].

³⁰² See G Pearson 'Reading suitability against fitness for purpose: the evolution of a rule (2010) 32 *Sydney Law Review* 311, 311.

³⁰³ See G Pearson 'Reading suitability against fitness for purpose: the evolution of a rule (2010) 32 *Sydney Law Review* 311, 333.

³⁰⁴ *Corporations Act* s 945A.

³⁰⁵ *Corporations Act* ss 961(1), 961B(1).

³⁰⁶ *Corporations Act* ss 961B(2).

³⁰⁷ *Corporations Act* s 961G.

product(s) against those need and objectives. Both regimes stop short of requiring that the most appropriate or most suitable product must be recommended/provided – in the Corporations Act, the requirement is to act in the best interest of the client and to provide ‘appropriate advice’ (which may include a recommendation about product(s)), and in the NCCP Act, the requirement is to provide a ‘not unsuitable’ product.

However, *Corporations Act* imposes a more robust standard of assessment than the NCCP. A comparison of products may be needed to meet the best interests duty. By contrast, under the NCCP Act there is no requirement that more than one product must be compared before a particular product can be assessed as ‘not unsuitable’.

6.3 Overview of the responsible lending obligation

The obligation to assess whether a particular credit contract (or increase in credit limit) is ‘not unsuitable’ for a particular consumer is imposed on credit providers³⁰⁸ and credit assistance providers who provide assistance with credit products.³⁰⁹ The scope of the obligation varies according to the stage at which it is provided. In the case of credit assistance providers, the obligation is to undertake a preliminary assessment.

The fact that a credit assistance provider has made a preliminary assessment in relation to a consumer does not relieve the credit provider of its obligation to make its own assessment. This position has been confirmed in two recent cases under the NCCPA, where the credit provider’s reliance on the credit assistance provider’s assessment was not sufficient. In *ASIC v The Cash Store*, Davies J explained:

‘The fact that AFA [the credit provider] outsourced all its functions to TCS [the credit assistance provider] does not exonerate it from liability for non-compliance with the Credit Act.’³¹⁰

By applying to both credit providers and credit assistance providers,³¹¹ the responsible lending obligations preclude lenders from distancing themselves from the credit assessment of a credit assistance provider such as a broker, as well as placing direct responsibilities to assess suitability on credit assistance providers themselves.

The suitability assessment cannot be made until the relevant licensee has obtained the information prescribed by the legislation, and has taken steps to verify the financial information, and a licensee is prohibited from providing credit or credit assistance if the assessment is that the contract or credit limit increase is unsuitable.

³⁰⁸ NCCP Act Part 3-2.

³⁰⁹ NCCP Act Part 3-1.

³¹⁰ *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liquidation)* [2014] FCA 926 [68] (‘ASIC v The Cash Store’); See also *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174 [1804] (‘ASIC v Channic (No 4)’).

³¹¹ Licensees ‘acting as an intermediary’ are not subject to the responsible lending obligations: see above part 4.

6.3.1 Prescribed inquiries and verification steps

Prior to making the suitability assessment, a credit licensee must:

- (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract;
- (b) make reasonable inquiries about the consumer's financial situation; and
- (c) take reasonable steps to verify the consumer's financial information.³¹²

The scope of these obligations is expressed in very general terms (eg, 'reasonable inquiries' and 'reasonable' steps to verify). ASIC has provided extensive guidance on how it views the obligations (ASIC RG 209).³¹³ There has also been some limited case law on these obligations, discussed here and below.³¹⁴

In terms of an overall approach, in *ASIC v The Cash Store*, Davies J expressed the view that the obligation entailed the making of inquiries and taking of steps that would be sufficient to enable an informed assessment of whether the credit contract would meet the consumer's requirements and objectives, and that the consumer would be able to comply with the contract without substantial hardship.³¹⁵ This suggests that perfunctory inquiries are likely to be insufficient, and that further inquiries might be needed if the consumer provided inconsistent or contradictory information.³¹⁶

6.3.2 Obligations are scalable

ASIC has taken the view that the obligations to make inquiries and take steps to verify information are scalable obligations, that is, what a licensee needs to do to meet the obligations in relation to a particular consumer will vary depending on the circumstances.³¹⁷ Factors that, in ASIC's view, will impact on the scope of the obligations in any particular instance include the following:

- The potential impact of an unsuitable contract – more inquiries may be necessary if the potential negative impact of an unsuitable contract is likely to be serious. Regard is given to the size of the loan relative to the consumer's capacity to pay.
- The complexity of the contract – less extensive inquiries are likely to be necessary if the product is simple, and vice versa.

³¹² NCCPA ss 117(1), 130(1), 140(1) and 153(1). Note also that the licensee must also make any inquiries and take any verification steps required by the regulations: ss(1)(d) and (e).

³¹³ ASIC Regulatory Guide 209 'Credit licensing: Responsible lending conduct'.

³¹⁴ See *ASIC v The Cash Store* [2014] FCA 926; *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2018] FCA 155; *Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd* [2015] FCA 393; *Ennis v Credit Union Australia* [2017] FCCA 549.

³¹⁵ *ASIC v The Cash Store* [2014] FCA 926 [28].

³¹⁶ N J Howell 'Small amount credit contracts and payday loans: The complementarity of price regulation and responsible lending regulation' (2016) 41(3) *Alternative Law Journal* 174, 177. See also ASIC RG209.51.

³¹⁷ ASIC RG209 *Credit licensing: responsible lending conduct* (2014) [19].

- The capacity of the consumer to understand the contract – more inquiries about the consumer’s requirements and objectives may be necessary if the consumer does not have the capacity to understand the contract, is confused about any the arrangements, or has conflicting objectives.
- Whether the customer is a new or existing customer – less extensive inquiries and verification steps may be needed for an existing customer compared to a new customer.³¹⁸

The level of inquiries that need to be made also depends on the nature of services and products that a licensee offers, for example, ASIC suggests that it might be reasonable for a credit provider to obtain a credit report, but not necessarily reasonable for a credit assistance provider to obtain such a report.³¹⁹

The high-level standards imposed by the responsible lending obligations, the scalability of the obligations, and their applicability to a wide range of credit products, means that it may be, in practice, difficult to identify in advance all of the inquiries and verification steps that will be ‘reasonable’ in any particular instance. Case law (limited as it is currently) can provide some examples, but, beyond minimum standards (eg, an expectation as to inquiries about income and housing costs), case law may not be able to provide much guidance. Also relevant is the fact that both of the recent contested cases in which the Federal Court considered the responsible lending obligations involved relatively high cost products and vulnerable consumers.³²⁰ These cases may therefore be limited in the extent to which they can provide detailed guidance on the application of these obligations to more mainstream products or consumers.

6.3.3 Reasonable inquiries about the customer’s objectives and requirements

ASIC suggests that the obligation to make reasonable inquiries about the customer’s objectives and requirements is designed to help licensees determine whether the credit product being offered will meet that purpose.³²¹ Among other things, this might involve seeking information about:

- the amount of credit needed;
- the time frame;
- the purpose for which the credit is being sought;
- the particular features of a credit product that are important to the consumer;
- any additional expenses to be financed by the credit.³²²

Note that where the licensee is a credit provider, the licensee is required to make inquiries about the maximum amount of credit required.³²³

In *ASIC v The Cash Store*, a case involving small, short-term loans, the court agreed with ASIC’s assessment that in order to meet the obligation to make reasonable inquiries about the consumer’s objectives and requirements in this case, there must be evidence of a stated

³¹⁸ ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [22] (Table 3).

³¹⁹ ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [25], [27].

³²⁰ *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liquidation)* [2014] FCA 926; *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174 (*ASIC v Channic (No 4)*). Other recent cases involved agreed statement of facts and admissions, thus the scope of application of the responsible lending obligations was not examined in detail.

³²¹ ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [34].

³²² ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [36].

³²³ NCCP Regulation reg 28JA.

purpose that is ‘specific enough to enable TCS [The Cash Store] reasonably to ascertain what the money was needed for’. ASIC argued (and the court agreed) that a stated purpose of ‘Bills’ would be sufficient if it was for an amount of under \$500, but that a stated purpose of ‘living expenses’ or ‘personal’ was not sufficient.³²⁴

In *ASIC v Channic (No 4)*, a case involving personal loans used to purchase second-hand cars, the same individual was the sole director/controlling mind of the car dealer, the credit assistance provider and the credit provider. The credit provider and the credit assistance provider were found to have contravened the responsible lending obligations.

The particular factors that were relevant to the obligation to inquire about the consumer’s objectives and requirements included:

- in the case of the credit assistance provider, the failure to inquire about the consumer’s need for credit assistance (which involved the payment of a brokerage fee) and how any fee would be paid;³²⁵ and the likely interest rate;³²⁶ and
- in the case of the credit provider, the failure to make any inquires *of the consumer* – instead, the credit provider relied on the documents supplied by the credit assistance provider, filled out a checklist as a clerical matter, and ‘told’ the consumer about the elements of the loan contract. An ‘interrogation’ of the consumer about their needs and objectives for that particular contract was necessary.³²⁷

6.3.4 Inquiries about the consumer’s financial situation

The second obligation is to make reasonable inquiries about the consumer’s financial situation. In *ASIC v The Cash Store*, Davies J explained that the obligation required ‘a sufficient understanding of the person’s income and expenditure’, and that this required, at a minimum, inquiries about the consumers’ income and living expenses.³²⁸ In turn, Davies J suggested that an inquiry into a consumer’s living expenses is likely to include reference to rent/mortgage payments, and grocery, utility and other expenses, and other debt.³²⁹

Similarly, ASIC in its Regulatory Guide suggests that the minimum inquiries would include inquiries into current income and source of that income; the extent of fixed expenses (including housing); and the extent of variable expenses (and the factors that drive those expenses, eg number of dependents).³³⁰

Depending on the particular transaction, other inquiries might also be relevant, including the prospective debtor’s age, credit history, assets, and potential for changes in income.³³¹ For

³²⁴ *ASIC v The Cash Store* [2014] FCA 926 [34-5].

³²⁵ *ASIC v Channic (No 4)* [2016] FCA 1174 [1745-6].

³²⁶ *ASIC v Channic (No 4)* [2016] FCA 1174 [1751].

³²⁷ *ASIC v Channic (No 4)* [2016] FCA 1174 [1812].

³²⁸ *ASIC v The Cash Store* [2014] FCA 926 [43].

³²⁹ *ASIC v The Cash Store* [2014] FCA 926 [52], see also N J Howell ‘Small amount credit contracts and payday loans: The complementarity of price regulation and responsible lending regulation’ (2016) 41(3) *Alternative Law Journal* 174, 177.

³³⁰ ASIC RG209 *Credit licensing: responsible lending conduct (2014)* [32].

³³¹ ASIC RG209 *Credit licensing: responsible lending conduct (2014)* [33]. In *ASIC v The Cash Store*, Davies J noted that, in addition to the minimum inquiries, ‘The extent to which further information and additional inquiries may be needed in order to assess the consumer’s financial capacity to service

example, in *ASIC v Channic (No 4)*, the failure to take account of the costs of owning, running, maintaining and insuring the vehicle they were to purchase was, in the circumstances of consumers with limited income, a failure to make reasonable inquiries about the consumer's financial situation.³³²

In addition, it is clear that the obligations require an inquiry as to the particular consumer's financial situation.³³³ Reliance on a standardised formula, for example, for determining living expenses, will be insufficient; in *ASIC v Channic (no 4)*, Greenwood J took the view that:

'The *adoption* of the notional figure is not *conduct* of "making" reasonable inquiries about the consumer's financial situation or *conduct* of "verifying" the consumer's financial situation.'³³⁴

In this case, the failure of the credit assistance provider to take account of, or make inquiries about the deductions being made from Centrelink payments (identified on the Centrelink statements) was also a failure to comply with the obligation to make reasonable inquiries.³³⁵

6.3.5 Verification of a consumer's financial situation

In *ASIC v The Cash Store*, Davies J noted that reasonable verification of a consumer's financial situation requires verification of at least income and housing payments.³³⁶

In *Ennis v Credit Union Australia*, a case involving a home loan, Jarrett J accepted that reference to bank statements, payment slips and Centrelink Income Statements were acts of verification;³³⁷ and that in this particular instance, where the consumer was an existing customer and there was nothing on the documents that pointed to the need to take further steps, no further verification was required.³³⁸ Jarrett J disagreed with any suggestion that the lender was required to disbelieve the borrower and her husband and go behind the material that had been provided by the borrower in support of the application.³³⁹

In *ASIC v ANZ*,³⁴⁰ ANZ admitted contraventions of the responsible lending obligations. In circumstances where ANZ (trading as Esanda) was aware that payslips could easily be falsified, and had been falsified, and where it had reason to doubt the reliability of information provided by particular intermediaries, its reliance on verifying income by reviewing payslips only, and not seeking a bank statement or previous payment information from existing customers, it failed to take reasonable steps to verify the consumer's financial

and repay the proposed loan and determine loan suitability will be a matter of degree in each particular case': *ASIC v The Cash Store* [2014] FCA 926 [42].

³³² *ASIC v Channic (No 4)* [2016] FCA 1174 [1752-53].

³³³ See also the claim by ASIC that the use of statistical benchmarks and an automated assessment process used by Westpac did not satisfy the responsible lending requirements: <https://www.smh.com.au/business/banking-and-finance/westpac-hits-back-at-asic-responsible-lending-claim-20170611-gwov08.html>.

³³⁴ *ASIC v Channic (No 4)* [2016] FCA 1174 [1736].

³³⁵ Eg *ASIC v Channic (No 4)* [2016] FCA 1174 [1758-64].

³³⁶ *ASIC v The Cash Store* [2014] FCA 926 [2014] FCA 926 [47].

³³⁷ *Ennis v Credit Union Australia* [2017] FCCA 549 [62].

³³⁸ *Ennis v Credit Union Australia* [2017] FCCA 549 [63].

³³⁹ *Ennis v Credit Union Australia* [2017] FCCA 549 [64].

³⁴⁰ [2018] FCA 155.

situation.³⁴¹ In this case, Middleton J also reiterated the importance of the verification of income as part of the responsible lending obligations:

‘Income is one of the most important parts of information about the consumer’s financial situation in the assessment of unsuitability, as it will govern the consumer’s ability to repay the loan. The core connection between the obligation under s 130(1)(c), the consumer’s ability to repay and the assessment of unsuitability is evident in the terms of ss 131(1) and (2)(a) and (4) of the Act.’³⁴²

6.3.6 Summary of the inquires and verification obligations

As noted above, there is little contested litigation on the obligations to make reasonable inquiries and take reasonable steps to verify information. In addition, none of the decided cases have been appealed. However, the guidance from the case law to date suggests that the obligations require, at a minimum:

- an inquiry into the consumer’s purpose for the loan, with some level of specificity (noting that ‘personal’ and ‘living expenses’ appear to be insufficient);
- an inquiry into the consumer’s income (including source), and key fixed and variable expenses; and
- verification information on income and housing costs.

Further, reliance on standardised formulas will not amount to making reasonable inquiries or taking reasonable steps to verify. Beyond this, it may be difficult to make any firm pronouncements of what will be sufficient to meet the obligations in the abstract.

6.3.7 Assessing suitability

Having made the reasonable inquiries and taken reasonable steps to verify the consumer’s financial information, the licensee must make an assessment of whether the proposed credit contract (or increase in credit) will be *not unsuitable* for the particular consumer.³⁴³ The reference to ‘not unsuitable’ makes it clear that the obligation is not to ensure that the product is the best or most appropriate product for that consumer, merely that it is ‘not unsuitable’.³⁴⁴ Note also that additional analysis is likely to be needed if the consumer will be switching from another provider or refinancing a loan.³⁴⁵

The assessment must be made within the 90 days before the licensee enters into the contract or makes an unconditional representation that the consumer is eligible to enter the contract.³⁴⁶ A longer time period for the credit provider’s assessment (120 days) is prescribed for home loans.³⁴⁷ The assessment must be based only on information about the consumers’ financial situation, requirements or objectives, and only where the licensee has reason to believe that the information is true, or would have such reason to believe if it had made the required inquiries and verification.³⁴⁸

³⁴¹ *ASIC v ANZ* [2018] FCA 155, [32].

³⁴² *ASIC v ANZ* [2018] FCA 155, [13].

³⁴³ NCCP Act ss 116, 128.

³⁴⁴ See G Pearson ‘Reading suitability against fitness for purpose: the evolution of a rule (2010) 32(2) *Sydney Law Review* 311, p 333.

³⁴⁵ See ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [132] – [137].

³⁴⁶ NCCP Act ss 115, 128.

³⁴⁷ NCCP Regulation reg 28J.

³⁴⁸ NCCP Act ss 118(4), 119(4), 131(4).

The NCCP Act provides that a credit contract will be unsuitable for a particular consumer:

‘if, at the time it is entered or the credit limit is increased:

- (a) it is likely that the consumer will be unable to comply with the consumer’s financial obligations under the contract, or could only comply with substantial hardship; or
- (b) the contract does not meet the consumer’s requirements or objectives; or
- (c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances apply to the contract.’³⁴⁹

As with other parts of the responsible lending obligations, ASIC has published detailed guidance on the suitability assessment.

6.3.8 Inability to comply at all or only with substantial hardship

The test in subsection (a) refers to whether the consumer is ‘likely’ to be unable to comply with the obligations. This requires a forward-looking assessment, examining whether there is ‘a real and not remote chance or possibility that the consumer will be unable to comply’.³⁵⁰

There are two components to this test – the credit contract will be unsuitable if *either* (i) the consumer is unable to comply with any and all of the financial obligations under the contract, *or* (ii) the consumer is able to comply with the financial obligations under the contract, but only with substantial hardship.³⁵¹ The assessment of the consumer’s ability to meet their financial obligations under the contract requires consideration of the consumer’s financial capability to comply with new financial obligations out of available net receipts.³⁵² This requires a proper understanding of the consumer’s income (including sources and existing deductions) and actual expenses. Other relevant factors may include the consumer’s domestic and family circumstances, credit history, and whether the consumer has a partner or another person who is willing to support them financially.³⁵³

In *ASIC v Channic (no 4)*, the court examined the financial information of the consumers, including the pattern of deposits and withdrawals in their bank accounts, and concluded that they were not in a financial position where they had funds available to pay additional loan repayments;³⁵⁴ that is, the loans were unsuitable on the basis of the first limb of subsection (a).

³⁴⁹ NCCP Act ss 118(2), 119(2), 131(2).

³⁵⁰ *ASIC v Channic (No 4)* [2016] FCA 1174 [1773].

³⁵¹ *ASIC v Channic (No 4)* [2016] FCA 1174 [1773].

³⁵² *ASIC v Channic (No 4)* [2016] FCA 1174 [1773].

³⁵³ *ASIC v Channic (No 4)* [2016] FCA 1174 [1773].

³⁵⁴ *ASIC v Channic (No 4)* [2016] FCA 1174 [1776 – 83].

The NCCP Act does not define ‘substantial hardship’ and ASIC notes in its Regulatory Guide:

‘We do not propose to give any definitive formulation of what substantial hardship means. The law about the meaning of ‘substantial hardship’ will develop and become clearer as cases come before the courts and judgments are handed down.’³⁵⁵

However, on the concept of ‘substantial hardship’, *ASIC v Channic (no 4)* merely noted that the term ‘means hardship of substance, that is, significant hardship’,³⁵⁶ but did not make any findings on the substantial hardship ground.

ASIC’s Regulatory Guide suggests that an assessment of whether compliance with the obligations would cause substantial hardship should take into account:

- what surplus the consumer has after covering their ongoing expenses and the payments required under the new contract;
- the source of the consumer’s income, and the consistency and reliability of that income;
- whether the consumer’s expenses are higher than average;
- the consumer’s other debt repayment and other financial commitments; and
- whether an asset will be needed to be sold to make the repayments.³⁵⁷

ASIC also takes the view that consumers should generally be able to make payments on a loan from income, rather than equity in an asset, although there are some exemptions (eg, bridging loans, reverse mortgages).³⁵⁸ Relatedly, in circumstances where the consumer can only comply with the financial obligations in the contract by selling their principal place of residence, the NCCP Act imposes a presumption that compliance with the obligation will cause substantial hardship.³⁵⁹ However, this presumption can be rebutted with evidence that compliance would not cause substantial hardship.

6.3.9 Contract does not meet the consumer’s objectives and requirements

As noted above, the licensee is required to make reasonable inquiries about the consumer’s objectives and requirements. The suitability assessment then involves an assessment of whether the particular product being considered meets those objectives and requirements. Factors that ASIC considers may be relevant in making this assessment include:

- ‘(a) the nature of the credit requested by the consumer, and the consumer’s stated objectives in obtaining the credit ...;
- (b) if the consumer has more than one requirement or objective, the relative importance of each to the consumer ...;
- (c) if the credit is to purchase a specific item, the term of the credit relative to the likely useful life of the asset;
- (d) the interest rate, fees and charges applying to the credit contract or consumer lease;
- (e) the consumer’s understanding of the proposed contract;

³⁵⁵ ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [97].

³⁵⁶ *ASIC v Channic (No 4)* [2016] FCA 1174 [1773].

³⁵⁷ ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [99].

³⁵⁸ ASIC Regulatory Guide 209 *Credit licensing: responsible lending conduct* (2014) [107].

³⁵⁹ NCCP Act ss 118(3), 119(3), 121(3).

- (f) for a consumer lease, whether the consumer is aware that they will not own the goods at the end of the contract;
- (g) the complexity of the credit contract or consumer lease, and whether a more basic product could meet the consumer's needs;
- (h) if other expenses ... are to be financed, whether the consumer is aware of this and accepts the additional costs of these expenses being financed;
- (i) whether the consumer will need to finance a large final payment under the contract; and
- (j) in relation to switching, the extent to which switching to the new credit contract will benefit the consumer.³⁶⁰

In *ASIC v Channic (no 4)*, ASIC argued that the contracts were unsuitable on the 'requirements or objectives' ground (as well as the 'financial obligations' ground), but the court did not make any explicit findings on this ground.³⁶¹

6.3.10 Assessment of suitability

The licensee must provide a written copy of the suitability assessment if the debtor requests this document.³⁶²

6.4 Responsible lending obligations for home loans and credit cards

Additional responsible lending rules (not including the responsible lending disclosure obligations discussed above) attach to various types of credit, including, among others, credit cards³⁶³ and home loans.³⁶⁴

6.4.1 Home loans

Carla wants to borrow \$300,000 to buy a new home. The proposed purchase is valued at \$800,000. A bank agrees to lend her the funds, and the credit contract provides for fortnightly repayments of \$850. Carla is retired and receiving only an aged pension of \$900 per fortnight. As the only way Carla would be able to meet the repayment obligations would be to sell her home, there will be a presumption that she can only meet the obligations with substantial hardship.

As noted above, in the case of home loans, there will be a presumption of substantial hardship if the consumer can only comply with the financial obligations under the contract by selling their principal place of residence.³⁶⁵

³⁶⁰ ASIC Regulatory Guide 209.122. See also ASIC REP 493 *Review of interest-only home loans: Mortgage brokers' inquiries into consumers' requirements and objectives* (2016).

³⁶¹ *ASIC v Channic (No 4)* [2016] FCA 1174 [1773].

³⁶² NCCP Act ss 120, 132.

³⁶³ NCCP Act Pt 3-2B.

³⁶⁴ NCCP Act Pt 3-2A.

³⁶⁵ NCCP Act ss 118(3), 119(3), 121(3).

6.4.2 Credit cards

Carla applies for a new credit card with a credit limit of \$5,000. Assume that ASIC has determined that the relevant period for assessing suitability for this type of credit card is 3 years. Although Carla has the capacity to meet the minimum repayments on this card, she does not have capacity to repay \$5,000 over three years. Carla will be taken to be able to comply with the repayment obligations only with substantial hardship. The credit card will be unsuitable for Carla.

Credit limit increase offers: Early amendments to the NCCP Act introduced restrictions on the extent to which credit providers can make unsolicited invitations to increase a credit card limit. These prohibit credit providers from making a credit limit increase invitation to a consumer unless it has received from the consumer express informed consent to the licensee making credit limit increase invitations.³⁶⁶ However, the forthcoming amendments will:

- not restrict credit limit increase invitations to being made by written communication; and
- repeal the defence that effectively permits such invitations if the consumer gives informed consent.³⁶⁷

As noted in the Explanatory Memorandum for the most recent amendments:

‘Amending the definition of ‘credit limit increase invitation’ in this way [allowing communication that is not written communication] is intended to extend the prohibition against unsolicited offers to increase a consumer’s credit limit under a credit card contract to invitations made in any form (for example, letters, emails, phone, in branch, or through an online portal). However, this extension is not intended to limit the ability of credit card providers to provide general information to consumers about credit card features including credit limits or to provide the functionality for consumers to request a credit limit increase if they so choose (for example, through a website or call centre).

The informed consent defence in section 133BF is also removed. Previously credit card providers could give consumers credit limit increase invitations where the consumer had expressly consented for the provider to do so. This defence will no longer be available for credit card providers for both new and existing credit card contracts.’³⁶⁸

These amendments are due to come into force on 1 July 2018.

Credit limit reductions: Also commencing on 1 July 2018 will be amendments to the NCCP Act that prevent credit providers from offering, or entering into, a credit card contract that does not allow the credit limit to be reduced, and that requires credit providers to permit consumers to make a credit limit reduction request online.³⁶⁹

Assessing suitability: A difficulty in assessing suitability for credit cards is the fact that minimum payments are only required to be made. However, very recent amendments will provide that, in the case of credit card contracts, if the consumer would be unable to repay an amount equal to the credit limit within a specified period, they will be taken to be able to comply with the contract obligations only with substantial hardship. ASIC will be given the

³⁶⁶ NCCP Act pt 3-2B, div 4. See also NCR reg 28LH on the meaning of ‘credit limit increase invitation’; this includes clarification that providing generic information about credit limits to credit card holders is not a credit limit increase invitation.

³⁶⁷ *Treasury Laws Amendment (Banking Measures No 1) Act 2018* sch 5, Pt 2

³⁶⁸ *Explanatory Memorandum, Treasury Laws Amendment (Banking Measures No 1) Bill (2017)* p 57.

³⁶⁹ *Treasury Laws Amendment (Banking Measures No 1) Act 2018*, pt 2 (introducing a new div 4).

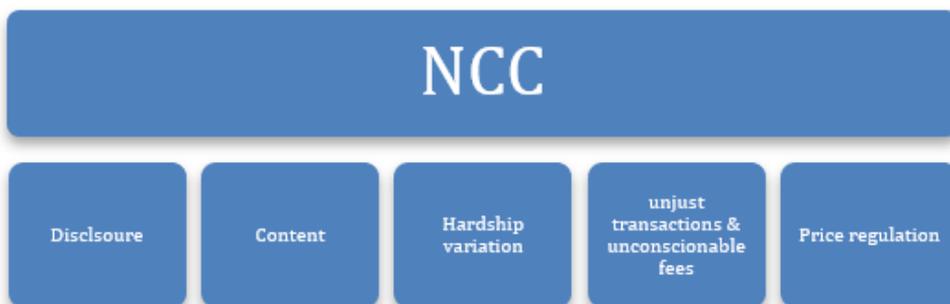
power to determine, by legislative instrument, the relevant period, and this can vary by classes of contracts, credit limits and interest rates.³⁷⁰

As noted in the Explanatory Memorandum:

‘The suitability of a credit card contract for a consumer is typically assessed on the basis of whether the consumer can afford to pay the minimum monthly repayment on the proposed credit limit amount. This may result in some consumers incurring credit card debt that cannot be paid down in a timely manner, which in turn can be associated with large cumulative interest charges. Reform 1 addresses this situation by introducing a requirement that a consumer’s suitability for a credit card contact or credit limit increase be assessed according to their ability to pay the credit limit within a certain period.’³⁷¹

These changes will come into effect on 1 January 2019.

7 The National Credit Code (NCC)



Schedule 1 to the NCCP Act contains the National Credit Code. The NCC largely replicates the Uniform Consumer Credit Code (UCCC), enacted in the *Consumer Credit (Queensland) Act 1994* (Qld) and applied in the States and Territories since 1996, into Commonwealth law.³⁷²

7.1 To whom does the NCC apply?

The NCC applies to regulated credit contracts (defined as discussed above), and its focus is on the conduct of businesses which provide credit; in general, it does not impose obligations on licensees providing credit assistance or otherwise acting as an intermediary.

³⁷⁰ *Treasury Laws Amendment (Banking Measures No 1) Act 2018*, pt 1

³⁷¹ *Explanatory Memorandum, Treasury Laws Amendment (Banking Measures No 1) Bill 2017* pp 52-3.

³⁷² The UCCC was enacted in a Schedule to the *Consumer Credit (Queensland) Act 1994*, which was adopted by each State and Territory as in force from time to time (with some modifications in the case of Western Australia and Tasmania). This process of creating ‘template legislation’ was achieved through the Australian Uniform Credit Law Agreement, which was signed by all States and Territories of Australia on 30 July 1993.

7.2 What are the main consumer protection provisions of the NCC?

The NCC provides rules about, primarily the formation, content, performance and ending of credit contracts, including rules on:

- pre-contractual disclosure;³⁷³
- content obligations for credit contracts³⁷⁴ and related mortgages and guarantees;³⁷⁵
- price regulation;
- unilateral and agreed changes to credit contracts;³⁷⁶
- hardship variations to credit contracts;³⁷⁷
- unjust transactions³⁷⁸ and unconscionable interest and charges;³⁷⁹
- ending and enforcement of credit contracts and related mortgages and guarantees;³⁸⁰
- related sale and insurance contracts.³⁸¹

In this section, we focus on the NCC obligations on disclosure, responsible lending, price regulation, unjust transactions, unconscionable fees and hardship variations.

7.3 Pre-contractual disclosure

The purpose of the disclosure requirements is to ensure that credit providers disclose all relevant information to a prospective borrower before the contract is entered into thus, ideally, allowing informed decision making by that borrower. Before the credit contract is made the credit provider must give the borrower a pre-contractual statement setting out prescribed matters,³⁸² and an information statement setting out the consumer's statutory rights and obligations.³⁸³ It is prohibited for a credit provider to enter into a credit contract without providing this information.

Documents under the NCC must be easily legible and clearly expressed.³⁸⁴ In addition, written documents must be in minimum 10-point font.³⁸⁵

³⁷³ NCC ss 16-18, 43, 56.

³⁷⁴ NCC Pt 2.

³⁷⁵ NCC Pt 3.

³⁷⁶ NCC Pt 4 Div 1 and 2.

³⁷⁷ NCC ss 72-75.

³⁷⁸ NCC s 76.

³⁷⁹ NCC s 78.

³⁸⁰ NCC Pt 5.

³⁸¹ NCC Pts 7 and 8.

³⁸² NCC s 16(1)(a).

³⁸³ NCC s 16(1)(b).

³⁸⁴ NCC s184(1), (2).

³⁸⁵ NCR reg 110.

Pre-contractual statement

The *pre-contractual statement* may be the proposed contract document or be a separate document or documents.³⁸⁶ In practice, it is likely that in most cases, the proposed contract document also performs the function of the pre-contractual statement.

The information to be provided in the pre-contractual statement is largely financial information about the credit to be provided, and includes information about the:

- amount of credit;
- annual percentage rate or rates;
- method of calculation of interest charges;
- total amount of interest charges payable;
- amount and number of repayments;
- credit fees and charges;
- how changes affecting interest and credit fees and charges will be effected;
- default rates;
- enforcement expenses;
- any mortgage or guarantee;
- any commission paid by or to the credit provider;
- any insurance financed by the contract.³⁸⁷

A subset of key financial information must be included in a table (the Financial Table) at the beginning of the pre-contractual statement, and it must be set out separately from the other information in the pre-contractual statement.³⁸⁸

Information statement

The *information statement* must be in accordance with Form 5, which is headed as follows:

‘Things you should know about your proposed credit contract

This statement tells you about some of the rights and obligations of yourself and your credit provider. It does not state the terms and conditions of your contract.

If you have any concerns about your contract, contact the credit provider and, if you still have concerns, your credit provider’s external dispute resolution scheme, or get legal advice.’

The information statement is set out in a question and answer format with answers to questions like: ‘How can I get details of my proposed credit contract?’ and ‘Can I pay my contract out early?’

Timing of disclosure

The pre-contractual statement and information statement must be provided before the contract is entered into; or before the debtor makes an offer to enter into the contract (whichever occurs first).³⁸⁹

³⁸⁶ NCC s 16(5).

³⁸⁷ NCC s 17 and NCR reg 72-74.

³⁸⁸ NCC s 16(4), NCR reg 72.

³⁸⁹ NCC s16.

As long as this requirement is met, there is no prescribed minimum time between when the information is provided and when the contract is entered into. As noted in a 2013 discussion paper:

‘In practice this means that consumers are usually provided with the summary at the same time as they enter into the contract. This limits a consumer’s opportunity to understand the exact terms of the offer.’³⁹⁰

Credit contract

The credit contract is required to be in the form of a written contract that is signed by the debtor and the creditor, or is signed by the credit provider and accepted by the debtor.³⁹¹ The matters that must be in the contract document are set out in the NCC.³⁹² The contract must also include a prescribed warning headed ‘Before you sign. Important. Things you must know.’³⁹³

There is some scope for combining documents to reduce the information overload, for example, it is permitted to combine two or more disclosure documents, but only where all other requirements of the NCC are met, including the obligations as to the timing of disclosure.³⁹⁴

Research on different pre-contractual disclosure documents was undertaken in 2010, and this recommended the introduction of a Financial Summary Table for consumer credit products.³⁹⁵ Proposed amendments to the NCC disclosure obligations were released for consultation in 2013,³⁹⁶ however, these proposals have not been taken any further.

7.3.1 Additional obligations for credit cards

Carla’s most recent credit card statement includes the following information:

If you make no additional charges using this card and each month you pay...	You will pay off the Closing Balance shown on this statement in about ...	And you will end up paying an estimated total of interest charges of ...
Only the minimum payment	22 years and 1 month	\$5,861
\$112	2 years	\$488, a saving of \$5,372

³⁹⁰ Cth Treasury *Changes to disclosure requirements under the National Consumer Credit Protection Act 2009 (Discussion Paper)* (2013) p 4.

³⁹¹ NCC s14.

³⁹² See NCC s16(1)(a) and s 17. Section 17 is also used to dictate the contents of the pre-contractual statement.

³⁹³ NCR reg 74, Form 6, 7.

³⁹⁴ Reg 28L(9).

³⁹⁵ Paul O’Shea *Simplification of Disclosure Regulation for the Consumer Credit Code: Empirical Research and Redesign* (Final Report) 2010.

³⁹⁶ The Australian Government the Treasury *Changes to disclosure requirements under the National Consumer Credit Protection Act 2009 (Discussion Paper)* (2013).

Credit cards: Credit providers are required to include a minimum repayment warning on credit card statements. This provides a personalised calculation of the total cost and duration of repayment only if the minimum amount is repaid, compared with the total cost and minimum payment to repay the outstanding balance over 2 years.³⁹⁷ This disclosure is designed to highlight to consumers the impact of paying only the minimum payment.

7.3.2 Other NCC disclosure obligations

Other disclosure obligations in the NCC include:

- The credit provider has an obligation to provide a regular statement of account. The maximum time between statements is 40 days for a credit card account, and 7 months for other products (eg, a home loan).³⁹⁸ There are also different timelines for statements for reverse mortgages and continuing credit contracts (other than credit card contracts).
- Various documents must be provided on request, including a statement of amount owing³⁹⁹ and statement of payout figure.⁴⁰⁰
- Credit providers must provide notice of variations made to the credit contract within specified time periods (the time depends on the type of variation made);⁴⁰¹
- Enforcement proceedings cannot be commenced until a specified period of time after the credit provider has given the debtor a default notice,⁴⁰² setting out, among other things, the default, action necessary to remedy default and period within which the default must be remedied to avoid enforcement proceedings.⁴⁰³
- Credit providers must provide a direct debit default notice the first time a direct debit default occurs.⁴⁰⁴
- Credit providers must provide the relevant comparison rate in an advertisement that contains an annual percentage rate.⁴⁰⁵ A comparison rate reflects the total costs of credit arising from the interest charges and other prescribed credit fees and charges. However, the comparison rate obligation does not apply to continuing credit contracts, including credit cards.⁴⁰⁶

³⁹⁷ NCCP Regulations reg 79B. Some exemptions apply.

³⁹⁸ NCC s 33(2). There are some circumstances where a statement is not required, see s33(3) NCC.

³⁹⁹ NCC s 36.

⁴⁰⁰ NCC s 83.

⁴⁰¹ NCC pt 4.

⁴⁰² NCC s 88(1).

⁴⁰³ NCC s88(3).

⁴⁰⁴ NCC s87.

⁴⁰⁵ NCC s 160.

⁴⁰⁶ NCC s158.

7.4 Price regulation

Traditionally, governments were reluctant to regulate prices, and instead relied on disclosure of information about fees, charges and interest rates to protect consumers. However, a number of States and Territories included price regulation (aimed at high cost products) in their credit legislation. Immediately prior to the NCCP Act, Queensland, the ACT and NSW had a comprehensive cap on the total cost of credit of 48% per annum, while Victoria had a cap on interest only of 48% for unsecured loans and 30% for secured loans.⁴⁰⁷

In 2012, amendments to the NCCP Act and NCC saw the introduction of national price regulation. Rather than introducing a universally applicable price cap, the amendments defined a number of categories of credit products and imposed differential price regulation on the various products.

7.4.1 Types of contracts regulated

The types of credit contracts identified in the NCCP Act and NCC are:

- short-term credit contracts (contracts with a duration of 15 days or less, a credit limit of \$2,000 or less, and where the contract is not a continuing credit contract);⁴⁰⁸
- small amount credit contracts (unsecured contracts with a duration of 16 days to 1 year, and a credit limit of \$2,000 or less, and where the contract is not a continuing credit contract);⁴⁰⁹
- medium amount credit contracts (contracts with a duration of 16 days to 2 years, and a credit limit of between \$2,001 and \$5,000, and where the contract not a continuing credit contract).⁴¹⁰

The changes introduced in Australia impose a differentiated price cap on consumer credit loans, where the size and form of the cap varies for each type of contract as follows:

- Small amount credit contracts – maximum establishment fee of 20% of the adjusted credit amount (the first amount of credit provided), monthly fee of 4%. No interest can be charged.⁴¹¹ Also, there is a limit on the amount that can be recovered in the event of default (200% of the adjusted credit amount).⁴¹²

⁴⁰⁷ See summary of the previous price caps in N Howell 'Interest rate caps and price regulation in consumer credit' (2013) in J Malbon and L Nottage (eds) *Consumer Law and Policy in Australia and New Zealand* (Federation Press), 313.

⁴⁰⁸ NCCP Act s 5(1).

⁴⁰⁹ NCCP Act s 5(1).

⁴¹⁰ NCC s 204(1).

⁴¹¹ See NCC s31A. Note that direct debit fees could originally be also passed on to consumers, however, the interim class order that permitted this has now been repealed, with effect from 1 February 2017 (ASIC (2016) 'Consumers will no longer be charged direct debit fees for payday loans' (Media release 16-376MR, 4 November 2016).

⁴¹² NCC s 39B. This does not apply to enforcement expenses: NCC s 39B(3).

- Medium amount credit contracts – maximum annual cost rate of 48% (inclusive of fees and charges) and \$400 establishment fee.⁴¹³
- Other credit contracts - maximum annual cost rate of 48% (inclusive of fees and charges).⁴¹⁴

The annual cost rate for a credit product is calculated using a formula set out in s 32B NCC. The formula incorporates the interest rate, and relevant fees and charges.

Price regulation does not apply to credit products offered by authorised deposit-taking institutions (banks, building societies and credit unions).⁴¹⁵ This was to provide certainty to these credit providers in relation to where products may otherwise breach the cap, and because authorised deposit-taking institutions ‘are subject to a broader range of prudential and regulatory oversight than other classes of credit providers’.⁴¹⁶

Short-term credit contracts are effectively banned.⁴¹⁷

There appear to be no decided cases examining the application of the price regulation provisions in the NCC, although ASIC has investigated some instances of non-compliance.⁴¹⁸

7.4.2 Impact on home loans, credit cards and car loans

Home loans – home loans (other than those issued by an ADI) are subject to an all-inclusive annual cost rate cap of 48%. However, as with credit cards, it is likely that most products have interest rates that fall well below this threshold (for example, a brief review of home loans compared on finder.com.au found interest rates and comparison rates⁴¹⁹ of between 3.5% and 5%.⁴²⁰ The annual cost rate will be greater, as it incorporates fees and charges, however, even with the addition of these costs, annual cost rates are likely to be well below 48% for most home loans.

⁴¹³ See NCC s 32A, and the calculation formula in s32B, which provides for an additional establishment allowance for medium amount credit contracts.

⁴¹⁴ See NCC s 32A, and the calculation formula in s32B.

⁴¹⁵ See definitions of small-amount and medium-amount credit contracts in NCCPA, s 5(1) and NCC, s 204(1); also NCC, s 32A(4).

⁴¹⁶ *Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012*, [5.48].

⁴¹⁷ NCCPA, ss 124A and 133CA. The Supplementary Explanatory Memorandum explains that ‘the short period of the loan means that the repayment will consume a disproportionate amount of the borrower’s income, resulting in risk of repeat use or financial hardship’: *Supplementary Explanatory Memorandum Consumer Credit Legislation Amendment (Enhancements) Bill 2012* (np 13 [1.48] and [1.49].

⁴¹⁸ Eg, ASIC (2016) ‘Payday lender penalised for overcharging consumers’ (Media release 16-027MR, 9 February 2016).

⁴¹⁹ See NCC Pt 10.

⁴²⁰ Even loans categorised as being for debtors with impaired credit had comparison rates of under 10% (eg, Pepper Home Loans, advertising a 8.73% comparison rate for a 95% loan to value ratio (<https://www.finder.com.au/pepper-home-loans-advantage-full-doc-home-loan?purpose=both#1011>)).

Credit cards – credit cards (other than those issued by an ADI) are subject to an all-inclusive annual cost rate cap of 48%.⁴²¹ In practice, most credit cards have interest rates of around 20%, so it is unlikely that, even with the incorporation of fees and charges, the cost rate will be exceeded for mainstream credit cards.

Car loans – car loans (other than those issued by an ADI) are subject to an all-inclusive annual cost rate cap of 48% (incorporating an establishment fee of up to \$400 if the loan is a medium amount credit contract). In the case of car loans, it is possible that non-mainstream lenders offer a product or products that might close in on this cap. For example, in *ASIC v Channic (no 4)*, the contracts had an annual percentage rate of 48%,⁴²² and some lenders displayed on finder.com.au display interest rates at, or just below, 48%.⁴²³

7.4.3 Review of SACC provisions

The price cap and other regulation of small amount credit contracts and consumer leases was reviewed in 2017. The Final Report recommended retention of the current price cap for small amount credit contracts (maximum of a 20% establishment fee, and 4% monthly fee), and also recommended that a similar price cap be introduced for consumer leases.⁴²⁴ The government has consulted on draft legislation to implement these recommendations,⁴²⁵ but to date, the Government has not introduced legislation to amend the Act; a private members Bill was tabled in Parliament on 27 February 2018.⁴²⁶

7.4.4 Other controls over fees and charges

There are also several other relatively recent constraints relating to fees and charges for consumer credit products:

- The unfair contract terms provisions in the ASIC Act do not apply to terms defining the upfront price under the contract but may apply to contingent fees;⁴²⁷
- There is a ban on certain exit fees paid on or in relation to the termination of the credit contract where any part of the debt is secured over residential property, and which is entered into after 1 July 2011.⁴²⁸ This obligation is relevant to home loans.
- Fees and charges may be challenged under the NCC on specified grounds as unconscionable, as discussed below.⁴²⁹

⁴²¹ Note that specific assumptions apply in calculating the annual cost rate of a continuing credit contract, see NCR reg 32B(8).

⁴²² Eg, *ASIC v Channic (no 4)* [291].

⁴²³ For example, loans from Cash Converters (<https://www.finder.com.au/cash-converters-medium-personal-loan>) and Swoosh Finance (<https://www.finder.com.au/swoosh-finance-loan>).

⁴²⁴ Cth Treasury *Review of the small amount credit contract laws* (Final Report) (2016), recommendations 1 and 11.

⁴²⁵ See Cth Treasury *Small amount credit contract and consumer lease reforms* (2017) (at <https://treasury.gov.au/consultation/c2017-t229374/>).

⁴²⁶ *National Consumer Credit Protection Amendment (Small Amount Credit Contracts and Consumer Lease Reforms) Bill* 2018.

⁴²⁷ *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 reduces the scope for challenging contingent fees on this ground. In that case, the majority of the High Court upheld the decision of the Full Federal Court that credit card late payment fees charged by ANZ were not penalties or unconscionable or unfair under the ASIC Act.

⁴²⁸ *National Consumer Credit Protection Regulations 2010* reg 79A.

⁴²⁹ NCC s 78.

7.5 Unconscionable interest and other charges

Under the NCC a court has power to annul or reduce (and make ancillary or consequential orders in relation to) certain fees and charges if satisfied that they are ‘unconscionable’. The relevant fees and charges are:

- a change to an annual percentage rate to which ss. 74 (1) or (4) applies (which relate to changes in annual percentage rates and to the method of calculation of interest charges, with limited exceptions),
- an establishment fee or charge,
- a fee or charge payable on early termination,
- a prepayment fee or charge.⁴³⁰

The NCC also sets out the basis on which a court may find that a change to an annual percentage rate,⁴³¹ an establishment fee or charge,⁴³² or a fee or charge payable on early termination or a prepayment fee or charge⁴³³ is unconscionable. The grounds for challenging these sums are relatively narrow.

ASIC may make an application in the public interest under these provisions, as well as the relevant debtor, mortgagor or guarantor being able to do so.⁴³⁴

7.6 Unjust transactions

Section 76 of the NCC contains a power for courts to ‘reopen’ an unjust credit transaction. This provision is modelled on the *Contracts Review Act 1980* (NSW).

The NCC does not define ‘unjust’ but states that the court must have regard to ‘the public interest and to all the circumstances of the case’.⁴³⁵ There is also a list of matters to which the court shall have regard, to the extent to which they are relevant to the circumstances, in deciding a transaction is unjust.⁴³⁶ The identified factors are similar to the considerations listed as relevant in assessing unconscionable conduct under the ASIC Act. However, the case law suggests that relief may be available under this provision under a wider range of circumstances and for unconscionable conduct.⁴³⁷

As with the prohibition on unconscionable conduct in the ACL, courts have declined to provide a narrow or precise definition of what amounts to an unjust transaction, preferring a case-by-case approach that focuses on the words of the section. In most cases, contracts have been set aside on the basis of a combination of concerns about the process by which the contract was made and the substantive unfairness of the terms.⁴³⁸

Where a court reopens a transaction as unjust it may make a range of orders giving relief to the consumer affected, including setting aside or revising the underlying contract.⁴³⁹

⁴³⁰ NCC s 78(1).

⁴³¹ NCC s 78(2).

⁴³² NCC s 78(3).

⁴³³ NCC s 78(4).

⁴³⁴ NCC s 79.

⁴³⁵ NCC s 76(2).

⁴³⁶ NCC s 78(2).

⁴³⁷ *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 26,699; [2011] NSWCA 389.

⁴³⁸ See eg *Permanent Mortgages Pty Ltd v Cook* [2006] ASC 155-082. Also J M Paterson, ‘Unconscionable Bargains in Equity and Under Statute’ (2015) 9 *Journal of Equity* 188-213.

⁴³⁹ NCC s 77.

7.7 Hardship variations under the NCC

7.7.1 Giving a hardship notice

The NCC provides a process for a debtor to seek a change to their credit contract if they consider that they are unable to meet their obligations under a credit contract.⁴⁴⁰ The process is commenced by the debtor giving their credit provider a 'hardship notice'; such a notice can be given orally or in writing.⁴⁴¹

If a debtor provides a hardship notice to their credit provider, the credit provider may, within 21 days, ask for more information from the debtor. The information requested must be relevant to deciding whether the debtor will be or is unable to meet their obligations under the credit contract; or how to change the contract.⁴⁴²

The credit provider must then consider whether it will agree to change the contract and give to the debtor a written notice of the decision. If no change is offered or agreed, the notice to the debtor must include reasons for the decision, together with details of the relevant dispute resolution scheme and the debtor's rights under that scheme.⁴⁴³ This notice must be provided 21 days after the credit provider has received the hardship notice, but a longer period is available if the credit provider has asked for more information from the debtor.⁴⁴⁴

The hardship rules in the NCC are facilitating or procedural provisions. They not impose any obligation on the credit provider to offer a change to the contract in response to the hardship notice.

This point is made explicit in the NCC:

The credit provider need not agree to change the credit contract, especially if the credit provider:

- (a) does not believe there is a reasonable cause (such as illness or unemployment) for the debtor's inability to meet his or her obligations; or
- (b) reasonably believes the debtor would not be able to meet his or her obligations under the contract even if it were changed.⁴⁴⁵

The NCC does not restrict the types of changes that a credit provider may offer or agree to in response to a hardship notice.

⁴⁴⁰ NCC s 72(1).

⁴⁴¹ NCC s72(1).

⁴⁴² NCC s 72(2).

⁴⁴³ NCC s 72(4).

⁴⁴⁴ NCC s 72 (5).

⁴⁴⁵ NCC note to s 72(3)

7.7.2 Challenging the credit provider's decision

If the credit provider does not agree to vary a credit contract in response to a hardship notice, the debtor may apply to the court to change the terms of the credit contract. After giving the relevant parties a reasonable opportunity to be heard, the court can make an order changing the credit contract or can refuse to change the contract.⁴⁴⁶ However, a court cannot make an order to change the contract in a way that would 'reduce the amount ultimately payable by the debtor to the credit provider under the contract'.⁴⁴⁷

Alternatively, and this is the course more commonly followed, a debtor can lodge a dispute with the relevant external dispute resolution (EDR) scheme (the Financial Ombudsman Service or the Credit and Investments Ombudsman). Both schemes have the jurisdiction to order a credit provider to change a credit contract on the grounds of hardship or financial difficulty.⁴⁴⁸ Although the NCC does not restrict the changes that an EDR scheme can impose, both schemes have determined that they will not order a change to a contract unless the change will result in the loan being repaid in full within a reasonable period.⁴⁴⁹

FOS also notes:

'We will only require an FSP to vary a regulated credit contract if we are satisfied that:

- the individual can demonstrate an ability to repay the debt in full if the contract is varied, even if this is over a longer period, and
- assistance would be appropriate – taking into account the individual's current financial position.
- demonstrating capacity to repay a debt can be achieved in a number of ways, including:
 - Regularly making repayments at a level to show that the debt can be repaid in a reasonable time if it was varied.
 - An individual providing information about their financial position to show how their circumstances have or will change, to enable future repayments to be met.
 - A combination of the above.'⁴⁵⁰

The emphasis on permitting only changes that would see a loan being repaid in full has been criticised as not adequately addressing situations of longer-term hardship and/or where the debtor is on a low, fixed income that is unlikely to change.⁴⁵¹

⁴⁴⁶ NCC s 74(2).

⁴⁴⁷ NCC s 74(2)(a).

⁴⁴⁸ FOS Terms of Reference (as amended 1 January 2018), cl 9.1(f); Credit and Investments Ombudsman, CIO Rules (10th edition, cl 9.6(i).

⁴⁴⁹ Financial Ombudsman Service (undated) *FOS Approach Financial Difficulty Series: Our power to vary regulated credit contracts*, 3. Credit and Investments Ombudsman, Position statement 2 (Financial Hardship cl 9.1(c).

⁴⁵⁰ *Ibid* 3.

⁴⁵¹ For example, financial counsellors reported that inappropriate arrangements for customers in long-term financial hardship were the biggest barrier to their clients accessing appropriate hardship assistance from banks or other credit providers. See P Ali, E Bourova and I Ramsay (2017) 'Financial hardship assistance behind the scenes: Insights from financial counsellors' [2017] *Aust J Soc Issues* 1, 9. See also the discussion in Phil Khoury (2017) *Independent Review of the Code of Banking Practice*, 129-131.

7.7.3 Litigation

There had been some litigation on the hardship provisions in their earlier form, however, some of these cases may have limited relevance now, as they focused on criteria for seeking a hardship variation that no longer apply, for example, previously a hardship application could only be made if the maximum amount of credit to be provided under the contract was under a specified threshold.⁴⁵² Cases have also considered whether the debtor had a ‘reasonable cause’ for seeking a hardship variation,⁴⁵³ and what type of changes should be made to the contract.⁴⁵⁴ Although there is no longer a requirement for the debtor to cite a particular cause for their financial difficulties, nor any restrictions on the types of changes that a credit provider can make following a hardship request, the extent to which the court will take these issues in account in any application under s74 NCC is not known.

However, a recent decision of the NSW Supreme Court examined the bank’s obligations under s72 NCC and its relationship with enforcement proceedings. In that case, McCallum J ordered that a default judgment be set aside because ‘the bank’s conduct ... deprived Ms Wales of the opportunity to avail herself of the remedies provided for in Division 3 of Part 4 of the Code’.⁴⁵⁵ However, McCallum J was also careful to confine the decision to the particular circumstance of the case, where Ms Wales had ‘endeavoured in good faith to engage the processes contemplated by the Code but was defeated by the bank’s passive resistance to those processes, coupled with its decision to move the court for judgment without notice to her’.⁴⁵⁶

8 The Australian Securities and Investments Commission Act (ASIC Act)



Following the States’ referral of powers to the Commonwealth under the *Corporations Agreement 2002*, financial services and financial products are regulated by the Commonwealth under the ASIC Act, with the ASIC as the national regulator. Section 131A of the CCA provides that the ACL does not apply ‘to the supply, or possible supply, of services that are financial services, or of financial products.’ In most relevant respects, the consumer protection provisions of the ASIC Act have been amended to maintain consistency with the ACL.⁴⁵⁷

⁴⁵² For example, *Permanent Trustees Victoria Ltd v Mona* [2010] NSWSC 1156 .

⁴⁵³ Eg *Jones v ANZ Banking Group Ltd* [2004] NSWCTTT 381, and *McNally v ANZ Banking Group Ltd* (2001) ASC 155-047.

⁴⁵⁴ Eg *Jones v ANZ Banking Group Ltd* [2004] NSWCTTT 381.

⁴⁵⁵ *Commonwealth Bank of Australia v Wales* [2012] NSWSC 407, [33].

⁴⁵⁶ *Commonwealth Bank of Australia v Wales* [2012] NSWSC 407 [43].

⁴⁵⁷ There is no equivalent to the ACL consumer guarantee regime in the ASIC Act.

The consumer protection provisions in the ASIC Act are more general in scope than many of the specific rules in the NCCP Act. The ASIC Act provisions may be seen as providing a consumer protection safety net to catch conduct that is not the subject of a more specific rule, and indeed in this sense may provide a response to regulatory arbitrage prompted by the rule based regime.⁴⁵⁸

8.1 To whom does the ASIC Act apply?

The consumer protection provisions of the ASIC Act are found in Division 2. They apply, primarily, to conduct in relation to the supply of financial services and financial products. Extensive definitions of a financial service and a financial product are found in ss 12BAB and 12BAA respectively, and include common credit products.⁴⁵⁹

8.2 Main consumer protection provisions of the ASIC Act

The primary protections for consumers of financial services under the ASIC Act are:

- prohibitions on misleading conduct;
- prohibitions on unconscionable conduct;
- statutory implied terms;⁴⁶⁰
- a regime rendering void unfair contract terms in standard form contracts.

8.3 Misleading or deceptive conduct

Carla engages a mortgage broker to assist her in obtaining a suitable loan. The broker advises Carla that the loan will be on certain terms. In fact, the terms are different to what is represented. Due to the complexity of the arrangements, Carla does not notice this difference before signing the contract.

The ASIC Act contains a simple and categorical prohibition on a business, in trade or commerce, engaging in conduct that is misleading or likely to mislead.⁴⁶¹ The statutory prohibitions on misleading conduct are some of the most widely litigated consumer protection provisions, including in commercial disputes.⁴⁶² There is no requirement of fault. Deliberate deceit, negligent misrepresentation and innocent misstatements may all infringe the prohibition.⁴⁶³ The general prohibition on misleading conduct in the ASIC Act is supplemented by prohibitions of specific forms of misleading conduct.⁴⁶⁴

Extensive enforcement and redress powers are available in response to a contravention of the prohibition on misleading conduct under the ASIC Act. These include: undertakings, substantiation notices, public warning notices, injunctions, damages, compensatory orders,

⁴⁵⁸ See J M Paterson and G Brody, 'Safety Net Consumer Protection' (2015) 38 *Journal of Consumer Policy* 331-355.

⁴⁵⁹ The definition of 'financial service' in ASIC Act s12BAB(1) includes providing financial product advice and dealing in a financial product, and a 'financial product' is defined to include a 'credit facility' (see s12BAA(7)(k)). Note that the definition of 'financial product' in the *Corporations Act* (see ss 763A – 765A) differs from the definition of financial product in the ASIC Act (see s 12BAA).

⁴⁶⁰ The consumer guarantees in the ACL that replaced the former implied terms for non-financial goods and services have not been implemented in the ASIC Act.

⁴⁶¹ ASIC Act s 12DA. Also repeated in the ACL s 18 (previously TPA s 52).

⁴⁶² Chief Justice Michael Black, 'The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1029.

⁴⁶³ *Parkdale Customer Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

⁴⁶⁴ ASIC Act ss 12DB, 12DC and 12DF.

redress for non-parties and non-punitive orders.⁴⁶⁵ Contraventions of the more specific prohibitions on misleading conduct also carry the possibility of criminal and civil penalties.⁴⁶⁶

8.4 Unconscionable Conduct

Carla enters into a credit contract with a lender. Carla is illiterate and the lender knows that. The lender knows that the terms in the written agreement do not correspond to what was discussed in negotiations but does not point this out to Carla.

ASIC Act contains prohibitions on unconscionable conduct under the ‘unwritten law’⁴⁶⁷ and on unconscionable conduct in connection with financial services.⁴⁶⁸ The ASIC Act also contains a statement of interpretative principles relevant in determining whether a person has engaged in unconscionable conduct⁴⁶⁹ and contains a list of matters that a court can take into account in determining whether a person has engaged in unconscionable conduct under the statute.⁴⁷⁰

As the language of the prohibition indicates, a high standard of serious moral wrongdoing or predatory or exploitative conduct by a business is required to infringe the prohibition on unconscionable conduct. In interpreting the statutory prohibitions courts have indicated that a high degree of ‘moral obloquy’ is required⁴⁷¹ and also relied on ‘community values’⁴⁷² in assessing what type of conduct is unconscionable under statute.

A party’s conduct merely in enforcing its rights under a contract has not typically been considered unconscionable. Thus, for example, in *Leveraged Equities Ltd v Goodridge*⁴⁷³ the Full Federal Court commented that ‘there is nothing unconscionable in a margin lender enforcing its legal rights to protect itself against a fall in the value of its security’.⁴⁷⁴ Unconscionable conduct has typically been found where there has been some form of ‘procedural unfairness’ in the bargaining process, rather than substantive unfairness’ in the terms of the contract.⁴⁷⁵

⁴⁶⁵ ASIC Act Div 2, subdiv G.

⁴⁶⁶ ASIC Act ss 12GB and 12GBA.

⁴⁶⁷ ASIC Act s 12CA.

⁴⁶⁸ ASIC Act s 12CB. Listed public companies cannot take advantage of this prohibition: ss 12CB(1)(a) and (b).

⁴⁶⁹ ASIC Act s 12CB(4).

⁴⁷⁰ ASIC Act s 12CC(4).

⁴⁷¹ *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583; [2005] NSWCA 261, [121] (Spigelman CJ). Also *Violet Home Loans Pty Ltd v Schmidt* (2013) 300 ALR 770, 785–6; [2013] VSCA 56, [58] (Santamaria JA, with whom Neave and Osborn JJA agreed). Also *Paciocco v Australia & New Zealand Banking Group Ltd* [2016] HCA 28, [188] (Gageler J). Cf *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18, [193] (emphasising the need to focus on the words of the prohibition).

⁴⁷² *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [23] (Allsop JA).

⁴⁷³ [2011] FCAFC 3, [417].

⁴⁷⁴ Note that margin lending is now specially regulated under the *Corporations Act*, with s 764A providing that a margin lending facility is a financial product.

⁴⁷⁵ Cf *ASIC v The Cash Store* [2014] FCA 926 [2014] FCA 926 (add-on insurance provided without adequate explanation and in circumstances where it was unsuitable); *Director of Consumer Affairs*

In a consumer credit context, the prohibition on unconscionable conduct has been used to provide a remedy to conduct subverting the protective function of credit law. For example in *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd* Perram J found unconscionable conduct in pressure placed on consumers to sign business purpose declarations avoiding the effect of the NCC.⁴⁷⁶

In some instances, courts have been prepared to hold that highly one-sided terms are unconscionable.⁴⁷⁷ The legislation expressly states that courts may have regard to the terms of the contract in assessing whether conduct is unconscionable.⁴⁷⁸ In this regard there is a considerable overlap with the regulation of unfair terms in the ASIC Act and s 78 of the NCC allowing review of unconscionable fees.⁴⁷⁹

Contravention of the prohibition on unconscionable conduct gives rise to similar remedies and enforcement options as for misleading conduct,⁴⁸⁰ including civil pecuniary penalties.⁴⁸¹

8.5 Implied terms

The ASIC Act s 12ED(1) implies a number of terms into contracts for the supply of financial services. The implied term regime contrasts with the ACL approach of providing statutory rights guaranteeing basic standards of quality in the supply of goods and services to consumers.⁴⁸²

The ASIC Act implies into contracts for the supply of financial services mandatory warranties (in the form of contract terms) that the services will be rendered with ‘due care and skill’, which is similar to the duty of care in tort.⁴⁸³

Victoria v Scully (2013) 303 ALR 168; [2013] VSCA 292 (difficult contract structure)

⁴⁷⁶ [2012] FCA 43. See also *ASIC v Wealth Management (No 2)* [2018] FCA 59 (Providing misleading information and targeting financially vulnerable persons); *ASIC v NAB* (2017) FCA 1338 (bill swaps).

⁴⁷⁷ See eg *Kowalczyk v Accom Finance Pty Ltd* [2008] NSWCA 343; (2008) 77 NSWLR 205 (provisions for higher ‘penalty’ interest and for compounding interest were unjust and unconscionable); *PSAL Ltd v Kellas-Sharpe* [2012] QSC 31 (appeal on different ground *Kellas-Sharpe v PSAL Ltd* [2012] QCA 371) (provision for higher penalty interest rate was not unconscionable; provision for capitalising interest was unconscionable).

⁴⁷⁸ ASIC Act s 12BC.

⁴⁷⁹ See further below.

⁴⁸⁰ ASIC Act pt 2, div 2, subdiv G.

⁴⁸¹ ASIC Act s 12GBA

⁴⁸² ACL Pt 3-2.

⁴⁸³ ASIC Act s12ED(1).

Also implied is a term that the services (and any materials in connection with the services) will be reasonably fit for any purpose or required result made known to the supplier by the consumer.⁴⁸⁴ Similar standards apply to the supply of non-financial services to consumers.⁴⁸⁵

These terms are only implied in 'consumer' contracts as defined in the ASIC Act (and similarly the ACL).⁴⁸⁶ A person is a consumer if: the price of the services did not exceed \$40,000; or, where the price exceeded \$40,000, the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or where the price exceeded \$40,000, the services were acquired for use or consumption in connection with a small business, and the services were of a kind ordinarily acquired for business use or consumption.⁴⁸⁷

Breach of these implied terms gives rise to contractual remedies, which must be pursued by the affected consumer. ASIC does not have any powers to take enforcement action if an implied term has been breached.

The implied terms cannot be excluded from a consumer contract,⁴⁸⁸ however, it is possible for the parties to limit liability to resupply (or the costs of resupply) if the services are not 'services of a kind ordinarily acquired for personal, domestic or household purposes.'⁴⁸⁹

8.6 Unfair Contract Terms

Carla enters into a credit contract with a credit provider. The contract gives the credit provider a right to vary the contract terms at any time.

The ASIC Act, like the ACL, contains a regime rendering void (ineffective) unfair terms in standard form consumer and small business contracts for financial services and financial products.⁴⁹⁰

The regime is a significant new development in consumer protection law because the test for unfairness focuses squarely on the substance of the terms (substantive unfairness) rather than on flaws in the process through which the contract was made (procedural unfairness), which is the primary focus of the prohibitions on misleading and unconscionable conduct.

A consumer contract for the purposes of the unfair contract terms regime:

is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.⁴⁹¹

A small business contract is by contrast defined by reference to the upfront price and number of employees.⁴⁹²

⁴⁸⁴ ASIC Act s12ED(2).

⁴⁸⁵ ACL ss 60-61.

⁴⁸⁶ ASIC Act s 12ED(1), (2).

⁴⁸⁷ ASIC Act s12BC(1); (3).

⁴⁸⁸ ASIC Act s 12EB.

⁴⁸⁹ ASIC Act s 12EC.

⁴⁹⁰ ASIC Act s 12BF(1).

⁴⁹¹ ASIC Act s 12BF(3).

⁴⁹² ASIC Act s 12BF(4): a contract is a *small business contract* if:

The unfair contract terms regime does not apply to terms that are ‘required, or expressly permitted, by a law of the Commonwealth, a State or a Territory’ or that define ‘the main subject matter of the contract’ or set ‘the upfront price payable under the contract’.⁴⁹³ The unfair contract terms law also does not apply to certain shipping contracts or to contracts that are constitutions of companies, managed investment schemes or other kinds of bodies.⁴⁹⁴

A term will be unfair if:

- a. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- b. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- c. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.⁴⁹⁵

In determining whether a term of a standard form consumer contract is unfair under the specified test of an unfair term, ‘a court may take into account such matters as it thinks relevant, but must take into account’ the extent to which the term is transparent and the contract as a whole.⁴⁹⁶ The onus is on the party who would be advantaged by the term to prove that it is reasonably necessary in order to protect the legitimate interests of that party.⁴⁹⁷

The ASIC Act sets out a list of ‘examples of the kind of terms of a consumer contract that may be unfair’.⁴⁹⁸ The examples are expressed in general language and any particular term under review for fairness must still be assessed with regard to the tests specified in the provision. Enforcement action by the regulators to date has centred on harsh and one-sided exclusion, termination, penalty, forfeiture and variation terms.⁴⁹⁹

A consumer may rely on an unfair term being void under the unfair terms regime as a defence in an action to enforce the term. A consumer or a regulator may also take pre-emptive action against an unfair term in a standard form consumer contract by seeking a declaration that the term is unfair and therefore void.⁵⁰⁰ There are a range of remedies

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- (a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
 - (b) either of the following applies:
 - (i) the upfront price payable under the contract does not exceed \$300,000;
 - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

⁴⁹³ ASIC Act s 12BI(1).

⁴⁹⁴ ASIC Act s 12BL.

⁴⁹⁵ ASIC Act s 12BG(1).

⁴⁹⁶ ASIC Act s 12BG(2).

⁴⁹⁷ ASIC Act s 12BG(4).

⁴⁹⁸ ASIC Act s 12BH.

⁴⁹⁹ See ACCC, *Unfair Contract Terms: Industry Review Outcomes* (March 2013); ACCC, *Unfair Terms on Small Business Contracts* (Nov 2016); ASIC at <http://asic.gov.au/about-asic/what-we-do/laws-we-administer/unfair-contract-terms-law/unfair-contract-term-protections-for-small-businesses/>.

⁵⁰⁰ ASIC Act s 12 GND(1).

potentially available to regulators and consumers in response to the use by traders of a term that has been declared unfair.⁵⁰¹

9 Code of Banking Practice Obligations

As noted above, the Code of Banking Practice (COBP) is a voluntary code that has been adopted by most banks offering retail products in Australia,⁵⁰² although there is no industry or legislative requirement that they do so. As also noted many consumers may be more likely to rely on enforcing their obligations under the COBP through negotiation or through the FOS than to pursue litigation through courts.

The COBP has undergone several iterations since it first came into effect in 1996. The current COBP was published in 2013 and was independently reviewed in 2016-17. The Australian Bankers' Association has announced that a revised Code has been provided to ASIC for approval,⁵⁰³ however, this revised Code has not yet been published. The discussions in this paper therefore refer to the 2013 COBP.

The provisions in the Code of Banking Practice ('COBP') apply to the 'banking services' offered by subscribing banks to their individual and small business customers. 'Banking services' is defined to mean 'any financial service or product provided by [a subscribing bank] in Australia to [an individual or small business customer]'.⁵⁰⁴

There are several provisions in the COBP that impose obligations on banks when they provide credit products. Many of these obligations cover similar ground to the provisions in the NCCP Act and NCC discussed above, however, the COBP also imposes some additional obligations.⁵⁰⁵ In addition, the provisions in the COBP have wider application than the NCCP Act / NCC, as they apply to both consumer and small business customers.⁵⁰⁶

9.1 Disclosure

Under the COBP, subscribing banks must provide a copy of the terms and conditions applicable to a banking service (including a credit product), and these terms and conditions must include information on the applicable fees, charges and interest rates.⁵⁰⁷ Other disclosure obligations require banks to:

- provide copies of the terms and conditions and other documents on request and within certain timeframes;⁵⁰⁸
- provide notification of unilateral changes to the terms and conditions;⁵⁰⁹

⁵⁰¹ ASIC Act ss 12GM, 12 GMB, 12GMC.

⁵⁰² In information provided to the most recent review of the Code of Banking Practice, the Australian Bankers' Association advised that over 95% of banking services in Australia are provided by banks that subscribe to the Code of Banking Practice: Phil Khoury *Independent Review of the Code of Banking Practice* (2017), p 10.

⁵⁰³ Australian Bankers' Association 'Customers set to benefit from new Banking Code' (Media Release, 20 December 2017).

⁵⁰⁴ COBP cl 42 (definitions of 'banking service', 'you' and 'small business').

⁵⁰⁵ For a discussion of some of the overlaps between the COBP and NCCP Act and NCC obligations, see Nicola J Howell 'Revisiting the Australian Code of Banking Practice: Is self-regulation still relevant for improving consumer protection standards?' (2015) 38(2) *UNSW Law Journal* 544, pp 557-562; Richard Viney *Review of the Code of Banking Practice* (Issues Paper, February 2001), ch 4.

⁵⁰⁶ COBP cl 42 (definitions of 'you' and 'small business').

⁵⁰⁷ COBP cl 12.1.

⁵⁰⁸ COBP cl 12, 13.

- provide regular statements of account;⁵¹⁰ and
- give prospective guarantors certain information about the guarantee and the debtor.⁵¹¹

9.2 Responsible lending

The COBP requires a subscribing bank to ‘exercise the care and skill of a diligent and prudent banker in selecting and applying [the bank’s] credit assessment methods and in forming [the bank’s] opinion about [the customer’s] ability to repay the credit facility.’⁵¹² This contrasts with the more prescriptive responsible lending obligations in the NCCP Act, however, it is the view of the Code Compliance Monitoring Committee that the principles of the NCCP Act ‘are a relevant consideration in deciding whether a Code-subscribing bank has exercised the care and skill of a diligent and prudent banker in relation to an individual customer’, and may also provide guidance when assessing compliance in relation to a small business customer.⁵¹³

In making decisions about compliance with this clause, the CCMC may consider relevant publications by FOS, the NCCP Act, and ASIC regulatory guides.⁵¹⁴ The CCMC will make assessments on a case by case basis, but it expects banks to:

- make reasonable inquiries about the customers’ circumstances objectives and financial situation, including any known vulnerability or disadvantage of the consumer;
- make reasonable inquiries to verify the customer’s financial situation;
- make further inquiries where needed (eg, if the customer has a history of late payments); and
- assess information about the customer from its own records, information from other accounts held by the customer at that bank, the purpose and size of the facility, and records about credit (eg, credit reports), bankruptcy and other personal insolvency administrations.⁵¹⁵

9.3 Financial difficulty assistance

Clause 28 of the Code of Banking Practice requires a subscribing bank to ‘try to help’ a customer who has financial difficulties with any credit facility they have with the bank (for example, by developing a repayment plan). Like s72 NCC, clause 28 of the COBP does not oblige a bank to offer any particular form of help or to agree to a repayment plan or other variation, and the obligations are primarily procedural.

Clause 28 is consistent with s72 NCC, however, it also provides some additional negative and positive obligations for subscribing banks, and additional rights for customers.

⁵⁰⁹ COBP cl 20.

⁵¹⁰ COBP cl 26.

⁵¹¹ COBP cl 31.

⁵¹² COBP cl 27.

⁵¹³ Code Compliance Monitoring Committee *Own motion inquiry: provision of credit (2017)*, p 9.

⁵¹⁴ CCMC *Guidance Note 9 (Provision of credit)*, p 2.

⁵¹⁵ *Ibid* 2-3.

These include:

- an obligation to deal with a customer's authorised representative (for example, a financial counsellor) on the customer's request;⁵¹⁶
- the potential for banks proactively to communicate with customers, so that financial difficulty assistance may be offered even if a specific request is not made by a customer;⁵¹⁷
- an obligation to 'respond promptly' and in writing, including with reasons, to requests for financial difficulty assistance;⁵¹⁸
- banks are prohibited from requiring customers to apply for early release of their superannuation;⁵¹⁹ something that would otherwise be permissible under the NCC;
- banks are required to tell customers about the hardship variation provisions in the NCC if they apply;⁵²⁰
- banks are required to promote their financial difficulty assistance programs and, where applicable, the rights under the NCC, and to ensure that staff are appropriately trained in the obligations under the Banking Code and the NCC.⁵²¹

In the absence of a definition of financial difficulty in the COBP, the CCMC considers financial difficulty to mean:

'that a customer is willing but unable to meet their obligations under a credit facility. This may be due to a change in circumstances such as illness, unemployment, an increase in living expenses or other cause. 3. It may require assistance such as a variation to a customer's repayment obligations but is unlikely to include overlooked or late payments, in the absence of evidence that the consumer is unlikely to be able to pay.'⁵²²

In assessing compliance, the CCMC may have regard to other COBP obligations, including the obligation to act fairly and reasonably towards customers, and will have regard to relevant legislation, ASIC regulatory guides, and the ABA's industry guideline 'Promoting understanding about banks' financial hardship programs'.⁵²³

Key aspects of the CCMC's interpretation of clause 28 include:

- banks must give 'genuine consideration' to a request for financial difficulty assistance, giving due regard to the customer's circumstances;
- consider requests on a case-by-case basis;
- consider longer-term assistance where there is evidence that a short-term solution will not contribute to a customer overcoming their financial difficulties;

⁵¹⁶ COBP cl 28.3.

⁵¹⁷ COBP cl 28.4.

⁵¹⁸ COBP cl 28.6, 28.8. This obligation mirrors that in the NCC, but has the effect of extending similar obligations to credit transactions that are not covered by the NCC.

⁵¹⁹ COBP cl 28.9.

⁵²⁰ COBP cl 28.7.

⁵²¹ COBP cl 28.10, 28.11.

⁵²² CCMC *Guidance Note 13 (Financial difficulty)*, p 2.

⁵²³ *Ibid* 3.

- if requests for assistance are made, reasons should be given in writing, be clear, and demonstrate that the bank has considered the customer's individual circumstances;
- banks should take a liberal approach towards telling the customer about the NCC hardship provisions if there is uncertainty about their application.⁵²⁴

9.4 Other COBP obligations

Other COBP obligations relevant to the provision of consumer credit, many of which overlap with obligations in the NCCP/NCC, include:

- various key commitments, including to provide information in plain language, and to act fairly and reasonably to customers, in a consistent and ethical manner;⁵²⁵
- an obligation to provide the terms and conditions of banking services to customers;⁵²⁶
- special commitments to indigenous consumers in remote communities and customers with special needs;⁵²⁷
- provision of information about suitable accounts for customers on low incomes or otherwise disadvantaged;⁵²⁸
- direct debits and chargebacks;⁵²⁹
- obligation to provide statements of account;⁵³⁰
- additional protections for joint debtors,⁵³¹ joint accounts and subsidiary cards,⁵³² and guarantees;⁵³³ and
- internal and external dispute resolution.⁵³⁴

9.5 Other industry codes

9.5.1 Customer-Owned Banking Code of Practice

Non-bank Authorised Deposit-Taking Institutions, such as credit unions and building societies, do not subscribe to the COBP. Instead, a clear majority of these organisations subscribe to the Customer-Owned Banking Code of Practice (COBCOP). The COBCOP is published by the Customer-Owned Banking Association, representing credit unions, mutual banks and building societies, and was most recently updated in 2018.

⁵²⁴ Ibid 3-4.

⁵²⁵ COBP cl 3. Note that the CCMC cannot investigate an allegation that a key commitment has not been complied with unless there is also a failure to comply with another obligation in the COBP: cl 36(b)(iii).

⁵²⁶ COBP cl 12. In practice, this overlaps with or duplicates much of what is in the NCC disclosure obligations.

⁵²⁷ COBP cl 7,8.

⁵²⁸ COBP cl 16.

⁵²⁹ COBP cl 21, 22.

⁵³⁰ COBP cl 26.

⁵³¹ COBP cl 29.

⁵³² COBP cl 30.

⁵³³ COBP cl 31.

⁵³⁴ COBP cl 37, 38, 39.

The COBCOP covers similar ground to the COBP,⁵³⁵ but varies in some of the detail. Like the COBP, the provisions of the COBCOP protect individual and small business customers, and apply to home loans, personal loans and credit cards, as well as other financial products and facilities issued by subscribing institutions.⁵³⁶

The provisions of the COBCOP are incorporated into the customer-bank contract, and a breach of the COBCOP can therefore be litigated as a breach of contract claim. Compliance with the COBCOP is monitored by an independent Customer-Owned Banking Code Compliance Committee,⁵³⁷ and the terms of the COBCCC can be considered by the relevant EDR scheme when resolving disputes.⁵³⁸

9.5.2 Mortgage and Finance Industry Association Code of Practice

The MFAA Code of Practice is published by the Mortgage and Finance Industry Association of Australia, an industry association that includes credit providers, mortgage brokers, loan writers, mortgage managers and others in the finance industry.

The MFAA Code is binding on MFAA members who are brokers, managers, servicers or credit providers, although clause 4 (general standards) applies to all MFAA members.⁵³⁹ The MFAA Code applies to individual and small business customers.⁵⁴⁰ Perhaps reflecting a different type of membership (including many non-ADIs, and credit intermediaries), the MFAA Code has a different emphasis to the COBP and COBCOP, with a greater emphasis on governing the relationships between consumers and intermediaries, rather than between consumers and credit providers.

The MFAA Code includes obligations about contracts with customers, arranging credit, and hardship applications. Complaints about non-compliance with the Code may be considered by the MFAA Investigations Officer⁵⁴¹ and/or MFAA Tribunal.⁵⁴² As with the other codes, the terms of the MFAA Code can be considered by the EDR schemes when resolving disputes.

⁵³⁵ Forerunners of the COBCOP were the Building Society Code of Practice and Credit Union Code of Proactive, which were closely modelled on the original Code of Banking Practice.

⁵³⁶ See Customer-Owned Banking Code of Conduct 2018, Part B.

⁵³⁷ See Customer Owned Banking Code Compliance Committee *Building trust in customer owned banking* <<http://www.cobccc.org.au/>>.

⁵³⁸ See discussion above.

⁵³⁹ MFAA Code, cl 3.1.

⁵⁴⁰ MFAA Code, cl 2.1(a), 14.2 (definition of customer).

⁵⁴¹ MFAA Disciplinary Rules (effective 14 September 2016), cl 2.1.1.

⁵⁴² MFAA Disciplinary Rules (effective 14 September 2016), cl 2.1.2, 2.1.3, 2.1.4, 2.1.5.

APPENDIX I: Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law (CC Act Schedule 2)
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
COBP	Code of Banking Practice
EDR	External dispute resolution
NCC	National Credit Code (NCCP Act Schedule 1)
NCCP Act	<i>National Consumer Credit Protection Act 2009 (Cth)</i>
NCR	<i>National Consumer Credit Protection Regulations 2009 (Cth)</i>
TPA	<i>Trade Practices Act 1974 (Cth)</i>

APPENDIX II: Parties regulated under the NCCP

Category	Meaning	Examples	Applicable statutory regime
credit 'consumer'	A natural person or a strata corporation ⁵⁴³		
credit licensee	A person authorized to engage in particular credit activities ⁵⁴⁴		
'credit provider'	a person who provides credit ⁵⁴⁵	Lenders, mortgagees, credit card issuers, financiers ⁵⁴⁶	NCCP Act (licensing, supervision of representatives, disclosure, responsible lending) NCC ASIC Act
'credit service' provider	A person who: <ul style="list-style-type: none"> • acts as an intermediary, or • provides credit assistance to a consumer⁵⁴⁷ 		

⁵⁴³ NCCP Act s 5.

⁵⁴⁴ NCCP Act s 35. A person is prohibited from engaging in credit activities without a licence: NCCP Act s 29. See eg *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18; *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2.

⁵⁴⁵ NCC s 204. Also assignees of credit providers under NCCP Act s 10;

⁵⁴⁶ ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (2017).

⁵⁴⁷ NCCP Act s 7. A party may act as both a credit intermediary and a credit assistance provider: ASIC Regulatory Guide 203 *Do I Need a Credit Licence?* (2017) [57].

Category	Meaning	Examples	Applicable statutory regime
'intermediary'	A person, who in the course of a business, acts as an intermediary between a credit provider and a consumer for the purposes of securing A provision of credit for the consumer under a credit contract with the credit provider. ⁵⁴⁸	Depending on the business model aggregators, ⁵⁴⁹ mortgage managers ⁵⁵⁰ and product designers ⁵⁵¹	NCCP Act (licensing but <u>not</u> responsible lending) ASIC Act
'credit assistance' provider	A person who deals directly with the consumer in the course of a business and who: <ul style="list-style-type: none"> • suggests that the consumer: apply for, increase the credit limit with or remain in a particular credit contract with a particular credit provider, or • assists the consumer to apply for or increase a credit limit in a particular credit contract with a particular credit provider⁵⁵² 	Credit, finance or mortgage brokers and advisers ⁵⁵³	NCCP Act (licensing, disclosure, responsible lending) ASIC Act

⁵⁴⁸ NCCP Act s 9.

⁵⁴⁹ *Revised Explanatory Memorandum National Consumer Credit Protection Bill 2009* (Cth) [1.31]; ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75].

⁵⁵⁰ *Revised Explanatory Memorandum National Consumer Credit Protection Bill 2009* (Cth) [1.31]; ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75]. See definition in NCR reg 26.

⁵⁵¹ ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75]. See definition in NCR reg 26.

⁵⁵² NCCP Act s 8.

Category	Meaning	Examples	Applicable statutory regime
'credit representative'	A person who is authorised by a credit licensee to Engage in specified credit activities on behalf of the licensee ⁵⁵⁴	Credit franchisee ⁵⁵⁵	NCCP Act (disclosure, supervision by credit provider) ⁵⁵⁶ ASIC Act
representative	<ul style="list-style-type: none"> • An employee or director of a credit licensee or related body corporate; • A credit representative of a credit licensee; or • Any other person acting on behalf of the licensee.⁵⁵⁷ 	Employees; franchisees; linked suppliers of goods or services (commonly)	NCCP (supervision obligations on the licensee)
Exempted provider of goods or services	<p>Credit is provided by:</p> <ul style="list-style-type: none"> • a linked credit provider⁵⁵⁸ (point of sale exemption') or • a co-branded credit card.⁵⁵⁹ 		No licensing requirements under the NCCP Act ASIC Act ACL (if providing goods or services)

⁵⁵³ ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) [75].

⁵⁵⁴ NCC Act s 64. See also NCC Act s 67 – a person cannot be a credit representative in relation to activities authorised by their own credit licence.

⁵⁵⁵ Who is not the credit provider: ASIC Regulatory Guide 203, *Do I Need a Credit Licence?* (2017) p 43.

⁵⁵⁶ A person who is authorised as a credit representative of a licensee does not need to hold an Australian credit licence when engaging in credit activities on behalf of the licensee. The licensee is responsible for supervising the activities of a representative: see NCCP Act pt 2-3.

⁵⁵⁷ NCCP Act s 5.

⁵⁵⁸ NCR regs 23, 25B.

⁵⁵⁹ NCR regs 23A, 25C.

APPENDIX III: Consumer protection statutes

	Credit	Other financial products and services	Other goods and services
<p><i>General consumer protection legislation, incl:</i></p> <ul style="list-style-type: none"> • Misleading or deceptive conduct • Unconscionable conduct • Unfair terms • Quality (guarantees or implied terms) 	ASIC Act, Part 2, div 2	ASIC Act, Part 2, div 2	Australian Consumer Law (sch 2, Competition and Consumer Act) ⁵⁶⁰
<p><i>Industry specific legislation, incl:</i></p> <ul style="list-style-type: none"> • Licensing • Disclosure • Conduct • Responsible lending / Advice 	National Consumer Credit Protection Act (incl sch 1, National Credit Code)	Corporations Act, ch 7 ⁵⁶¹	Varies

⁵⁶⁰ *Competition and Consumer Act 2010* (Cth) s 131A (the ACL does not apply to credit).

⁵⁶¹ *Corporations Act* s 765(1)(h)(i) and *Corporations Regulations 2001* reg 7.1.06 (for the purposes of the Act financial product does not include credit). The exception is that margin lending is subject to regulation under the *Corporations Act* and not the NCCP Act, despite being a form of credit. See NCC s 6(12) – the Code does not apply to the provision of credit by way of a margin loan; and s *Corporations Act* s 764A(1)(l) – a margin lending facility is a financial product. Note that the definition of ‘financial product’ in the *Corporations Act* (see ss 763A – 765A) differs from the definition of financial product in the ASIC Act (see s 12BAA).